

REDACTED VERSION

**Before the
Federal Communications Commission
Washington, D.C. 20554**

FCC 16D-1

In the Matter of)	
)	
Game Show Network, LLC,)	
Complainant,)	MB Docket No. 12-122
)	
v.)	File No. CSR-8529-P
)	
Cablevision Systems Corp.)	
Defendant.)	

Issued: November 22, 2016

Released: November 23, 2016

**INITIAL DECISION OF
CHIEF ADMINISTRATIVE LAW JUDGE RICHARD L. SIPPEL**

Appearances

Stephen A. Weiswasser, Esq., Paul W. Schmidt, Esq., Elizabeth H. Canter, Esq., Laura Flahive Wu, Esq., Stephen Kiehl, Esq., C. William Phillips, Esq., and Jonathan M. Sperling, Esq., on behalf of *Game Show Network, LLC*; Jay Cohen, Esq., Andrew G. Gordon, Esq., Gary R. Carney, Esq., George W. Kroup, Esq., Tara M. Corvo, Esq., and Robert G. Kidwell, Esq., on behalf of *Cablevision Systems Corporation*; and Pamela S. Kane, Esq., and William Knowles-Kellett, Esq., on behalf of the *Enforcement Bureau*.

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I. PRELIMINARY STATEMENT

1. On October 12, 2011, Game Show Network, LLC (GSN) filed with the Media Bureau a program carriage complaint against Cablevision Systems Corporation (Cablevision)¹ alleging that Cablevision, a cable operator and multichannel video programming distributor (MVPD),² discriminated against GSN, a video programming vendor,³ in violation of section 616 of the Communications Act of 1934, as amended (Act),⁴ and section 76.1301(c) of the Commission’s rules.⁵

¹ *Game Show Network, LLC v. Cablevision Systems Corp.*, MB Docket No. 12-122, Program Carriage Complaint (filed Oct. 12, 2011).

² An MVPD is “an entity engaged in the business of making available for purchase, by subscribers or customers, multiple channels of video programming . . . includ[ing] . . . but not limited to, a cable operator, . . .” 47 CFR § 76.1000(e).

³ A “video programming vendor” is “a person engaged in the production, creation, or wholesale distribution of video programming for sale.” 47 U.S.C. § 536(b).

⁴ 47 U.S.C. § 536(a)(3).

2. In its complaint, GSN principally contends that on the basis of affiliation and non-affiliation, Cablevision moved GSN from a broadly penetrated expanded basic tier to a narrowly penetrated premium sports tier that required Cablevision subscribers to pay an additional fee for continued access to GSN, and such move had the effect of unreasonably restraining GSN's ability to compete fairly.⁶ As a remedy, GSN requested that the Media Bureau order Cablevision to restore GSN to the expanded basic tier and that the Media Bureau impose on Cablevision the maximum permissible monetary forfeiture.⁷ GSN also requested that the Media Bureau require Cablevision, which carries GSN at-will,⁸ to negotiate in good faith and enter into a new carriage agreement with GSN; and that such new agreement provide that GSN will be carried on a tier no less distributed than the most broadly penetrated tier on which Cablevision carries WE tv, an affiliated network,⁹ and at a license rate¹⁰ that is no less than the greater of the rate Cablevision currently pays WE tv, or the rate Cablevision paid GSN prior to February 1, 2011, the effective date of Cablevision's retiering conduct.¹¹

3. On May 9, 2012, the Media Bureau released its *Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture (HDO)*, in which it found that the "existing record, including Cablevision's Answer, makes clear that there are significant and material questions of fact warranting resolution at hearing."¹² The Media Bureau designated the following issues for hearing before an Administrative Law Judge (Presiding Judge): (a) whether Cablevision has engaged in conduct the effect of which is to unreasonably restrain the ability of GSN to compete fairly by discriminating in video programming distribution on the basis of the complainant's affiliation or non-affiliation in the selection, terms, or conditions for carriage of video programming provided by GSN, in violation of section 616(a)(3) of the Act and/or section 76.1301(c) of the Commission's rules; and (b) in light of the evidence adduced pursuant to the foregoing issue, whether Cablevision should be required to carry GSN on its cable systems on a specific tier or to a specific number or percentage of Cablevision subscribers and, if so, the price, terms, and conditions thereof; and/or whether Cablevision should be required to implement such other carriage-related remedial measures as are deemed appropriate.¹³

4. The Media Bureau did not designate for hearing the following issues: (a) whether GSN has put forth evidence in its complaint sufficient to warrant designation of this matter for hearing; and (b) whether GSN's complaint was filed in accordance with the program carriage statute of limitations.¹⁴ In

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⁵ 47 CFR § 76.1301(c).

⁶ See Complaint at 2-3, paras. 2, 5.

⁷ *Id.* at 31-32, para. 64.

⁸ Cablevision formerly carried GSN pursuant to a carriage agreement that expired on {{REDACTED}}, and has carried GSN at-will since then. *Infra* paras. 21-24.

⁹ A network is "affiliated" with an MVPD if either entity holds an interest in the other, or if a third party holds an interest in both entities, that is an "attributable interest" as defined by section 616 of the Act and its implementing regulations. See *Game Show Network, LLC v. Cablevision Systems Corp.*, MB Docket No. 12-122, Joint Glossary at 1 (filed Sept. 11, 2015) (copy attached).

¹⁰ The license rate, also referred to as the license fee, is typically expressed as an amount of money per subscriber per month, and is the amount of money Cablevision pays to GSN for the right to distribute the network on its cable systems. See Joint Glossary at 3.

¹¹ Complaint at 32, para. 65.

¹² *Game Show Network, LLC v. Cablevision Systems Corp.*, MB Docket No. 12-122, Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture, 27 FCC Rcd 5113, 5121, para. 11 (MB May 9, 2012).

¹³ *Id.* at 5136-37, para. 39.

¹⁴ *Id.* at 5114 n.5.

the *HDO*, the Media Bureau resolved those issues in GSN's favor¹⁵ noting that insofar as Cablevision seeks Commission review of the Media Bureau's conclusions, such review, if any, "shall be deferred until exceptions to the Initial Decision in this proceeding are filed."¹⁶ The Presiding Judge has no interest in the aforesaid procedural questions resolved prior to designation and declines Cablevision's invitation that he address the statute of limitations issue.¹⁷ Accordingly, the Media Bureau's conclusion shall be deferred as indicated above.

5. Otherwise, the Media Bureau directed that the Presiding Judge "develop a full and complete record" and "conduct a *de novo* examination of all relevant evidence" in issuing an Initial Decision on each of the outstanding factual and legal issues.¹⁸ In addition, pursuant to Section 503(b) of the Act,¹⁹ the Presiding Judge should determine "whether an Order of Forfeiture shall be issued against Cablevision."²⁰

6. Following discovery, a hearing was scheduled to commence on April 2, 2013. Thereafter, at the joint request of GSN and Cablevision, the hearing was postponed until July 16, 2013,²¹ and subsequently was "held in indefinite abeyance"²² while the parties considered further discovery in light of the 2013 decision of the United States Court of Appeals for the District of Columbia Circuit in *Tennis Channel*.²³ Consistent with joint status reports, abeyance ended and discovery reopened in May 2014.²⁴ Following the completion of such supplemental discovery and the submission of direct written testimony, proposed exhibits, and trial briefs, a trial-type hearing was held in the courtroom of the Office of Administrative Law Judges at Commission headquarters.

7. Such hearing was conducted by the Presiding Judge from July 7, 2015 through July 20, 2015.²⁵ Five witnesses testified on behalf of GSN.²⁶ Seven witnesses testified on behalf of Cablevision.²⁷

¹⁵ See *id.* at 5119, para. 9 ("we conclude that GSN has established a *prima facie* case of program carriage discrimination pursuant to Section 616(a)(3) of the Act and Section 76.1301(c) of the Commission's Rules"); *id.* at 5122, para. 12 ("we conclude that the complaint was timely filed pursuant to Section 76.1302(f)(3) of the Commission's Rules").

¹⁶ *Id.* at 5114 n.5, citing 47 CFR § 1.115(e)(3); see also *id.* at 5122 n.71 and at 5135 n.193.

¹⁷ See *Game Show Network, LLC v. Cablevision Systems Corp.*, MB Docket No. 12-122, Cablevision Systems Corporation's Post-Trial Brief (Cablevision Br.) at 24-25 and n.84 (filed Sept. 30, 2015).

¹⁸ *HDO*, 27 FCC Rcd at 5136, para. 38. The Media Bureau also directed that all reasonable efforts be made to issue the Initial Decision on an expedited basis. *Ibid.*

¹⁹ 47 U.S.C. § 503(b).

²⁰ *HDO*, 27 FCC Rcd at 5137-38, para. 44.

²¹ *Game Show Network, LLC v. Cablevision Systems Corp.*, MB Docket No. 12-122, Order, FCC 13M-7 (ALJ Mar. 26, 2013).

²² *Game Show Network, LLC v. Cablevision Systems Corp.*, MB Docket No. 12-122, Order, FCC 13M-12 (ALJ June 25, 2013).

²³ *Tennis Channel, Inc. v. Comcast Cable Commc'ns, L.L.C.*, MB Docket No. 10-204, Initial Decision of Chief Administrative Law Judge Richard L. Sippel, 26 FCC Rcd 17160 (2011), *aff'd in part, vacated in part*, Memorandum Opinion and Order, 27 FCC Rcd 8508 (2012), *rev'd sub nom. Comcast Cable Commc'ns, LLC v. FCC*, 717 F.3d 982 (D.C. Cir. 2013), *cert. denied*, 134 S. Ct. 1287 (2014) (*Tennis Channel*).

²⁴ See *Game Show Network, LLC v. Cablevision Systems Corp.*, MB Docket No. 12-122, Order, FCC 14M-13 (ALJ Apr. 17, 2014).

²⁵ See *Game Show Network, LLC v. Cablevision Systems Corp.*, MB Docket No. 12-122, Order, FCC 15M-16 (ALJ Apr. 28, 2015).

²⁶ GSN presented the testimony of three fact witnesses: David Goldhill, President and Chief Executive Officer of GSN; Dale Hopkins, Executive Vice President of Distribution for GSN; and John Zaccario, Executive Vice

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Each testifying witness was cross-examined. Approximately 1000 documentary exhibits were received into evidence.²⁸

8. After the hearing, GSN and Cablevision each filed: (1) Proposed Findings of Fact and Conclusions of Law; (2) Proposed Reply Findings of Fact and Conclusions of Law; and (3) Post-Trial Briefs. The Enforcement Bureau, which participated in the hearing as a party representing the public interest, filed Comments opposing the Complaint.

9. Upon joint request, GSN and Cablevision were permitted to present oral argument on October 30, 2015, which was conducted and recorded in the Commission Meeting Room.

II. FINDINGS OF FACT

A. Description of Parties and Background

1. Game Show Network

10. GSN is a national “female-targeted”²⁹ general entertainment³⁰ cable network³¹ that launched³² on December 1, 1994 as “Game Show Network.” In 2004, it rebranded itself as “GSN.”³³ At

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President, Advertising Sales, for GSN. In addition, GSN presented two expert witnesses: Hal Singer, Ph.D., Principal at Economists Incorporated and Senior Fellow at Progressive Policy Institute; and Timothy Brooks, an independent media consultant and media researcher.

²⁷ Cablevision presented the testimony of three fact witnesses: Thomas Montemagno, Executive Vice President of Programming for Cablevision; Elizabeth Dorée, Senior Vice President, Programming Strategy & Acquisitions for WE tv; and Robert Broussard, President of AMC Networks Distribution. In addition, Cablevision presented four expert witnesses: Jonathan Orszag, Senior Managing Director of Compass Lexecon, LLC; Michael Egan, Principal of Renaissance Media Partners, LLC; Lawrence Blasius, Principal, Blasius Media & Marketing; and Hal Poret, Senior Vice President, ORC International.

²⁸ In this Initial Decision, documents produced and/or moved into evidence by: GSN are referenced as GSN Exh.; Cablevision are referenced as CV Exh.; and both GSN and Cablevision are referenced as Joint Exh.

²⁹ GSN Exh. 300—Revised Direct Testimony of Timothy Brooks (Brooks Expert Testimony) at 15 (Brooks testified that “[i]t is well understood in the business that there are female-targeted networks, male-targeted networks, and general audience networks” and “GSN falls clearly within the definition of what constitutes a female-targeted network.”). *See also* Tr. at 1326:10-11 (Brooks testified that while the television viewing audience on the whole generally skews female—i.e., “[o]verall television viewing is roughly 52 percent female to 48 percent [male], sometimes 51 to 49 [percent], that degree of difference”); *id.* at 1326:15-25 (Brooks further testified that female-targeted networks have a significantly greater female-to-male skew than the general skew; for example, Brooks testified that a cable network that skews 70 percent female to 30 percent male is “[d]efinitely” a female-targeted network.).

³⁰ In this Initial Decision, the phrase “general entertainment” refers to entertainment programming that is not sports.

³¹ Separate from its cable television network, GSN is also an online games company. *See* Tr. at 185:6-10 (Goldhill testified that “GSN is a company that is in two businesses: the television business, through GSN, the network . . . [a]nd in the online games business, which we operate as a separate company that offers games through all online platforms.”).

³² Launching occurs when an MVPD commences carriage of a particular video programming network.

³³ GSN Exh. 297—Supplemental Direct Testimony of David Goldhill (Goldhill Testimony) at 2. A purpose of the rebranding was to accommodate the introduction of reality shows into GSN’s lineup. GSN Exh. 301—Supplemental Direct Testimony of Hal J. Singer, Ph.D. (Singer Expert Testimony) at 3. *See also* Goldhill Testimony at 2 (Goldhill testified that the network “began referring to its service as ‘GSN’ rather than ‘Game Show Network’ in order to present itself as a general interest network that appeals to women.”); Tr. at 256:19-20 (Goldhill testified that “GSN, like other networks, moved from its original name to a different name to capture a broader audience.”). *Compare* Joint Exh. 5—Deposition of Kelly Goode (Goode Testimony) at 145-46 (Goode, who at the

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the time of Cablevision's retiering conduct – the November 2010 time-frame³⁴ – GSN was distributed to approximately 73.5 million subscribers nationwide,³⁵ including to approximately {{[REDACTED]}} million Cablevision subscribers³⁶ in the New York Designated Market Area (DMA).³⁷ On February 1, 2011, the effective date of the retiering,³⁸ GSN's distribution dropped to approximately {{[REDACTED]}} or 96 percent fewer Cablevision subscribers.³⁹

11. At the time of GSN's retiering, GSN was co-owned by Sony Pictures Entertainment, Inc. and DIRECTV, a satellite operator and MVPD.⁴⁰ Sony and DIRECTV controlled GSN through a management committee on which Derek Chang, DIRECTV's former Executive President of Content, Strategy and Development, served at the time of retiering.⁴¹

12. David Goldhill, who testified at the hearing, has been President and Chief Executive Officer (CEO) of GSN since joining the network in 2007.⁴² GSN executives who reported directly to Goldhill include Dale Hopkins, Executive Vice President of Distribution,⁴³ and John Zaccario, Executive Vice President, Advertising Sales,⁴⁴ both of whom also testified at the hearing. The record also includes

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time was GSN's Senior Vice President of Programming, testified that in July 2011, GSN considered rebranding the network in an effort to change the "perception among younger viewers" that game shows are programming for older female viewers).

³⁴ In this Initial Decision, the phrase "at the time of retiering" (and similar) generally refers to the period between Cablevision's decision in November 2010 to retier GSN, and February 1, 2011, the effective date of that decision. *See* Tr. at 1517:10-15 (Montemagno testified that Cablevision made the decision to retier GSN "in the November 2010 time frame when we were looking at our 2011 budgets.").

³⁵ CV Exh. 256 at 5; *see also Game Show Network, LLC v. Cablevision Systems Corp.*, MB Docket No. 12-122, Cablevision Systems Corporation's Proposed Findings of Fact and Conclusions of Law (filed Sept. 11, 2015) (Cablevision's Findings and Conclusions) at 8 ("As of February 1, 2011—the date Cablevision implemented its retiering decision—GSN was a fully penetrated network with approximately 73.5 million subscribers nationwide.").

³⁶ GSN Exh. 93 at 1; CV Exh. 147 (at the time of retiering, GSN was distributed to "{{[REDACTED]}}" Cablevision expanded basic tier subscribers).

³⁷ A DMA is a geographical designation of a media market created by Nielsen Media Research. *See* Joint Glossary at 2. New York and Los Angeles are the two largest DMAs, and rotating as the largest and second-largest DMA in the nation. *See* Joint Exh. 3—Deposition of James Dolan (Dolan Testimony) at 10-11. At the time of retiering, Cablevision had approximately 3 million subscribers in the New York DMA alone. *Id.* at 7-8.

³⁸ *E.g.*, Tr. at 1525:9-11 (Montemagno testified that Cablevision began distributing GSN on the premium sports tier on "February 1, 2011").

³⁹ *See* GSN Exh. 93 at 1; CV Exh. 147 (Montemagno handwritten note that as a result of the retiering, GSN would be distributed to "{{[REDACTED]}}" Cablevision premium sports tier subscribers rather than being distributed to the approximately {{[REDACTED]}} Cablevision subscribers on the expanded basic tier).

⁴⁰ *See* Goldhill Testimony at 2.

⁴¹ Joint Exh. 2—Deposition of Derek Chang (Chang Testimony) at 11, 14-16 (Chang began his employment with DIRECTV in 2006 as Senior Vice President of Strategy; he became Executive Vice President of Content, Strategy and Development in 2007, and held that position until January 4, 2013, the date his employment with DIRECTV ended; Chang was no longer employed by DIRECTV at the time of his deposition on January 15, 2013).

⁴² Goldhill Testimony at 2; Tr. at 173:13-19.

⁴³ GSN Exh. 303—Supplemental Direct Testimony of Dale Hopkins (Hopkins Testimony) at 1 (Hopkins began her employment with GSN in 2009 as Chief Marketing Officer; she became the Executive Vice President of Distribution in March 2011, which is the position she held at the time of the hearing).

⁴⁴ GSN Exh. 298—Supplemental Direct Testimony of John Zaccario at 1 (Zaccario began his employment with GSN in 2008 as Senior Vice President, Advertising Sales; his position subsequently was changed to Executive Vice President, Advertising Sales, which is the position he held at the time of the hearing); *see also* Tr. at 717:16-22

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the deposition transcripts of two former GSN executives who reported directly to Goldhill; they are Dennis Gillespie, who held the position of Senior Vice President of Distribution until February 2011,⁴⁵ and Kelly Goode, who was the Senior Vice President of Programming until September 2011.⁴⁶

2. Cablevision Systems Corporation

13. Cablevision is a Delaware corporation that was organized in 1997.⁴⁷ At the time of the retiering conduct that is the subject of the Complaint, Cablevision was a vertically integrated MVPD that was owned and controlled by the Dolan family, with James Dolan serving as CEO.⁴⁸ Through its wholly-owned subsidiary CSC Holdings LLC, Cablevision operated cable systems with approximately 3.3 million subscribers, of which approximately 3 million were in the New York DMA, and about 300,000 were in western states.⁴⁹ At the time of GSN's retiering, based on number of subscribers, Cablevision was the largest MVPD in the New York DMA and the fifth largest MVPD in the nation.⁵⁰ Through its wholly-owned subsidiary, Rainbow Media Holdings LLC (Rainbow), Cablevision owned and operated several cable programming networks, including AMC, IFC, Sundance, WE tv, and Wedding Central.⁵¹

14. During this time, Thomas Rutledge, Chief Operating Officer (COO) of Cablevision, oversaw both the cable distribution (CSC/Cablevision) and cable programming (Rainbow) subsidiaries,⁵² and figuratively was referred to as "Dad," which reflected his role as sole arbiter of the subsidiaries' disputes.⁵³ John Bickham was President of Cable and Communications, and he reported directly to

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(Zaccario testified that his responsibilities for overseeing "all advertising activities for the television network" have been the same since he joined GSN in January 2008).

⁴⁵ Joint Exh. 4—Deposition of Dennis K. Gillespie (Gillespie Testimony) at 5-8 (Gillespie was GSN's Senior Vice President of Distribution from February 2007 until his health-related retirement in February 2011; he subsequently worked as a consultant for GSN until December 2011; in January 2012, Gillespie began employment as Senior Vice President of Distribution for Outside Television, which was the position he held at the time of his deposition on December 11, 2012).

⁴⁶ Goode Testimony at 12 (Goode joined GSN in October 2008 as Senior Vice President of Programming and held that position until September 2011, when she became a producer for GSN, which was the position she held at the time of her deposition on January 17, 2013).

⁴⁷ GSN Exh. 133 at 4 (Cablevision Securities and Exchange Commission Form 10-K for the fiscal year ended December 31, 2010).

⁴⁸ See Dolan Testimony at 6; Tr. at 1538:22-1539:5. See also GSN Exh. 397 (Cablevision organizational chart "as of 2010/2011").

⁴⁹ Dolan Testimony at 7-8. The remaining approximately 300 thousand Cablevision subscribers were located in Montana, Wyoming, Colorado, and Utah, and are attributed to its acquisition of Bresnan Broadband Holdings, LLC. See GSN Exh. 133 at 5; Complaint at 2 n.2 ("In December 2010, Cablevision acquired Bresnan Communications, thereby obtaining approximately 300,000 subscribers . . ."). See also Joint Glossary at 1 (describing Cablevision's acquisition and disposition of Bresnan).

⁵⁰ See Dolan Testimony at 6-9; see also GSN Exh. 232 (a chart listing the largest MVPDs, in descending order, as Comcast, Time-Warner, Cox, Charter, and Cablevision).

⁵¹ Tr. at 1535:19-1536:3; *id.* at 1916:7-9; Dolan Testimony at 13. In July 2011, Rainbow was spun-off from Cablevision into AMC Networks Inc., an independent company that also was owned and controlled by the Dolan family. See Tr. at 1538:16-18; CV Exh. 337—Direct Testimony of Thomas Montemagno (Montemagno Testimony) at 23 n.4; Dolan Testimony at 16. See also Joint Glossary at 4; Singer Expert Testimony at 2 n.1.

⁵² Tr. at 1537:13-1538:6; Joint Exh. 1—Deposition of John Bickham (Bickham Testimony) at 160 (Bickham testified that "Rainbow and Cablevision . . . were sister companies.").

⁵³ See *id.* at 151; GSN Exh. 33 (8/6/09 internal Cablevision email in which Cablevision's distribution side complained that its counterpart programming side "go[es] crying to dad!"—i.e., Thomas Rutledge).

Rutledge.⁵⁴ Mac Budill, Executive Vice President of Programming reported to Bickham.⁵⁵ Thomas Montemagno, who testified at the hearing, was Cablevision's Senior Vice President of Programming Acquisition and he reported directly to Budill.⁵⁶ Bickham's counterpart on Cablevision's programming side was Josh Sapan, President and CEO of Rainbow.⁵⁷ Sapan reported directly to Rutledge, and Ed Carroll, Rainbow's COO, reported directly to Sapan.⁵⁸ Robert Broussard, who testified at the hearing, was Rainbow's President of Distribution,⁵⁹ and he reported directly to Carroll.⁶⁰

15. WE tv is a national female-targeted cable network that launched in 1997 as "Romance Classics," a movie network, and relaunched in 2001 as "WE: Women's Entertainment," a general entertainment network.⁶¹ In 2006, the network rebranded itself as "WE tv."⁶² At the time of GSN's retiering, WE tv was distributed to approximately 77 million subscribers nationwide,⁶³ including the approximately { [REDACTED] } million Cablevision subscribers in the New York DMA.⁶⁴ Kimberly Martin was President and General Manager of WE tv.⁶⁵ She reported directly to Carroll.⁶⁶ Elizabeth Dorée, who

⁵⁴ Bickham Testimony at 8 (Bickham was Cablevision's President of Cable and Communications from May 2004 until November 2011; since May 2012, Bickham has been COO of Charter Communications, which was the position he held at the time of his deposition on February 8, 2013). Prior and subsequent to his employment with Cablevision, Bickham worked with and directly reported to Rutledge, who from 1995 to 2004, worked for Time-Warner Cable. *Id.* at 9-10. In 2011, Bickham and Rutledge left Cablevision { [REDACTED] } after the retiering. *See* Dolan Testimony at 212 (Dolan testified that Rutledge and Bickham left Cablevision { [REDACTED] }). Once employed at Charter, Bickham continued to report directly to Rutledge, who became Charter's CEO. Bickham Testimony at 8.

⁵⁵ *See* Bickham Testimony at 11-12, 35.

⁵⁶ Tr. at 1537:1-3; Montemagno Testimony at 1-2; *see also* Bickham Testimony at 12-13. Post-retiering of GSN, Cablevision reorganized its executive structure with Montemagno replacing both Rutledge and Bickham as Executive Vice President of Programming for Cablevision, which was the position he held at the time of the hearing. *See* Montemagno Testimony at 1-2; Tr. at 1494:5-9 (Montemagno testified that he currently held "the top position" for Cablevision's distribution side). *See also infra* note 530.

⁵⁷ *See* Joint Exh. 7—Deposition of Josh Sapan (Sapan Testimony) at 8-9, 11-12 (Sapan was President and CEO of Rainbow from early 2000 until July 2011, when Rainbow was spun-off from Cablevision as AMC Networks, an independent company that is controlled by the Dolan family. Sapan has been President and CEO of AMC Networks since the spin-off, which was the position he held at the time of his deposition on March 2, 2015.).

⁵⁸ *Id.* at 20.

⁵⁹ CV Exh. 339—Direct Testimony of Robert Broussard (Broussard Testimony) at 1 (Broussard has been President of Distribution for Rainbow/AMC Networks since 2006, which was the position he held at the time of the hearing).

⁶⁰ *See* GSN Exh. 397.

⁶¹ *See* Joint Exh. 6—Deposition of Kimberly Martin (Martin Testimony) at 35-36.

⁶² *See id.* at 36 (the purpose of the rebranding was "to attract younger viewers, to have a more contemporary appeal and WE tv has a more hip, younger vibe than Women's Entertainment"). *See also* Dolan Testimony at 54 (describing the evolution of the network from Romance Classics to WE tv).

⁶³ Singer Expert Testimony at 16 (Singer testified that "[i]n 2011, Nielsen estimated that WE tv had 76.8 million subscribers nationwide."). *See also* Cablevision's Findings and Conclusions at 9-10 ("At the time of the retiering, WE tv was a fully-penetrated network with approximately 77 million subscribers, and it has approximately 79 million subscribers today.").

⁶⁴ *See* CV Exh. 147 (showing that the expanded basic tier was distributed to { [REDACTED] } subscribers).

⁶⁵ Martin Testimony at 9-12 (Martin has been General Manager of WE tv since 2007; in 2010, the title of President was added, which was the position she held at the time of her deposition on January 15, 2013.).

⁶⁶ *See id.* at 15.

testified at the hearing, was WE tv's Senior Vice President for Scheduling & Acquisitions.⁶⁷ She reported directly to Martin.⁶⁸

16. Martin was also the President and General Manager of Wedding Central,⁶⁹ a female-targeted general entertainment network that Cablevision launched in August 2009, and shut down on June 30, 2011.⁷⁰ At the height of its existence, Wedding Central was distributed to a total of approximately 4 million subscribers nationwide: approximately 2.4 million Cablevision subscribers; approximately 1 million Time-Warner subscribers; and approximately 600 thousand MediaCom subscribers.⁷¹ During its brief existence, Wedding Central was not distributed by any other MVPD.⁷²

17. As relevant here, at the time of retiering, Cablevision offered its subscribers two broadly penetrated tiers of programming⁷³—Broadcast Basic and iO Family Cable, also known as Expanded Basic.⁷⁴ Cablevision also offered two narrowly penetrated tiers—iO Silver and iO Gold. The basic tier, which generally consisted of the broadcast networks, was received by 100 percent of Cablevision's 3 million subscribers.⁷⁵ The expanded basic tier, which included 56 networks⁷⁶ in addition to those on the basic tier, was received by approximately { [REDACTED] } percent or { [REDACTED] } Cablevision subscribers.⁷⁷ The Silver tier included all of the networks distributed as the expanded basic tier plus additional networks, including premium movie networks, and was received by approximately { [REDACTED] } percent of

⁶⁷ CV Exh. 338—Direct Testimony of Elizabeth Dorée (Dorée Testimony) at 1-2 (Dorée joined WE tv in 2001 as Vice President of Program Planning; in 2006, she became Vice President of Acquisitions and Promotional Strategy; in July 2009, she became Senior Vice President, Scheduling and Acquisitions; and, in 2014, she became Senior Vice President, Programming Strategy & Acquisitions, which was the position she held at the time of the hearing); *see also* Tr. 1695:20-1696:22.

⁶⁸ *See* GSN Exh. 397.

⁶⁹ Martin Testimony at 17.

⁷⁰ Martin Testimony at 18 (Martin served as President and General Manager of Wedding Central “[f]rom the date of launch until the date it was shut down.”). Similarly, Dorée “had the same responsibilities for Wedding Central that [she] had for WE tv.” Dorée Testimony at 15. At the time of the spin-off of Rainbow, Cablevision also made the decision “to close Wedding Central down because it was not profitable at that time.” Martin Testimony at 20.

⁷¹ Martin Testimony at 85-86. Broussard testified that at its launch in August 2009, Wedding Central was distributed to 2.2 million Cablevision subscribers. Tr. at 2021:14-19.

⁷² Tr. at 1944:5-7, 2022:1-23.

⁷³ A tier is a package of programming networks on an MVPD's system that the MVPD sells to its subscribers as a unit. *See* Joint Glossary at 5. A network's “penetration” is a percentage reflecting the proportion of a particular MVPD's subscribers that receive a particular network. *Id.* at 3. *See also* Bickham Testimony at 36 (Bickham testified that, of Cablevision's tiers, broadcast basic had the greatest penetration or “largest number of subscribers followed by, in descending order, expanded basic, Silver, and Gold tiers, and “the sports tier . . . ha[d] the least penetration.”).

⁷⁴ *See* Joint Glossary at 5.

⁷⁵ *See* GSN Exh. 133 at 8 (Cablevision's basic tier “generally includes local over-the-air broadcast stations such as . . . ABC, NBC, CBS, FOX . . . and public, educational or governmental channels.”).

⁷⁶ *See infra* para. 19.

⁷⁷ *See* CV Exh. 99 at 1; *see also* GSN Exh. 133 at 8 (Cablevision's expanded basic tier “includes, among other programming, news, information, entertainment, and sports channels such as CNN, AMC, CNBC, Discovery, ESPN and the Disney Channel.”); Tr. at 1927:18-23 (Broussard testified that the “[e]xpanded basic [tier] might best be described as the second-most highly-penetrated level of service. It's essentially received by all [Cablevision] subscribers other than subscribers that only receive local broadcast channels, government-related networks, informational networks like C-SPAN . . . it is the first sort of robust package of [top] cable networks.”).

Cablevision subscribers.⁷⁸ The Gold tier included every network distributed on the Silver tier plus additional premium networks, and was received by approximately { [REDACTED] } percent of Cablevision subscribers.⁷⁹

18. Subscribers to Cablevision's expanded basic tier (or a higher tier⁸⁰) also could subscribe to the iO Sports Pak tier, an a la carte package of premium sports networks, for an additional fee of \$6.95 per month.⁸¹ Dolan testified that the Sports Pak tier consisted entirely of "male-oriented programming" that Cablevision packaged together "so that we don't burden the entire subscriber base with the expense of programming that only a few want to see."⁸² Clearly, GSN's programming and viewers do not fit in a tier of Dolan's description. At the time of retiering, approximately 3 percent of Cablevision's subscribers also subscribed to the Sports Pak tier.⁸³

19. Cablevision distributed 56 networks on the expanded basic tier at the time of retiering. In addition to its affiliated general entertainment networks (AMC, Fuse, and WE tv⁸⁴), its affiliated sports networks (MSG, MSG Plus, and MSG Varsity⁸⁵), and its affiliated news network (News 12⁸⁶), Cablevision distributed the following non-affiliated networks on the expanded basic tier: A&E Network; ABC Family; Animal Planet; BET; Bravo; Cartoon Network; CNBC; CNN; Comedy Central; Daystar; Discovery Channel; Disney Channel; E!; ESPN; ESPN2; Eternal Word Television Network; Food

⁷⁸ See CV Exh. 99 at 1 (as of January 2010, Cablevision had { [REDACTED] } Silver tier subscribers); Tr. at 1669:4 (Montemagno testified that the Silver tier had premium movie networks "HBO and Showtime in it").

⁷⁹ See CV Exh. 99 at 1 (as of January 2010, Cablevision had { [REDACTED] } Gold tier subscribers).

⁸⁰ Broussard testified that Cablevision distributed its affiliated networks IFC and Sundance on its digital basic tier, which was "the next most highly concentrated package" and "had a penetration . . . in the neighborhood of { [REDACTED] } percent." Tr. at 1929:20-22. In light of this uncontested testimony from Broussard which was based on his personal knowledge, the Presiding Judge finds that GSN expert Singer's conflicting statement that Cablevision "carried IFC and Sundance on its 'iO Silver' tier (reaching { [REDACTED] } of subscribers)," Singer's testimony, Singer Expert Testimony at 2, is incorrect. At the time of retiering, Cablevision also distributed its affiliated network, Wedding Central, on the digital basic tier. Tr. at 2024:20-21 (Broussard testified that "[d]igital basic is the package that . . . Cablevision carried Wedding Central on."). See also Singer Expert Testimony at 2 (Singer testified that Cablevision distributed Wedding Central on its "'iO Package' tier (reaching { [REDACTED] } of subscribers).").

⁸¹ See Joint Glossary at 5; Singer Expert Testimony at 2-3. Three days after GSN's retiering, the Sports Pak tier was renamed the Sports and Entertainment Pak tier on February 4, 2011. See *infra* para. 49.

⁸² Dolan Testimony at 150. See also Brooks Expert Testimony at 72 (Brooks testified that except for GSN, "[a]ll of the other networks on the tier are sports and/or male oriented."); Montemagno Testimony at 22 (Montemagno testified that the Sports Pak tier was "a group of largely sports channels available to all Cablevision subscribers at a modest extra monthly fee" [of \$6.95]).

⁸³ See CV Exh. 147 (12/3/10 handwritten note by Montemagno that Cablevision currently had "{ [REDACTED] }" Sports Pak subscribers and "{ [REDACTED] }" expanded basic tier subscribers). See also GSN Exh. 93 at 1 (12/5/10 memorandum from Gillespie to Chang advising that moving GSN from expanded basic to the Sports Pak tier reduced Cablevision's carriage of GSN by 97 percent).

⁸⁴ See Dolan Testimony at 160-61.

⁸⁵ See *id.* at 64; Singer Expert Testimony at 15. See also Tr. at 1615:25-1617:3 (Montemagno testified that until 2010 Cablevision also owned the Madison Square Garden Company—a separate company owned and controlled by the Dolan family—which, in addition to MSG networks, among other things, owned professional basketball team New York Knicks, and professional hockey team New York Rangers); *id.* at 1620:3-15 (Montemagno testified that MSG and MSG Plus are both owned and operated by the Madison Square Garden Company, which in turn is controlled by the Dolan family); Bickham Testimony at 160-61 (Bickham testified that "Cablevision Systems Corporation owned a cable company, a programming company, [and] Madison Square Garden, which also owned teams and other things.").

⁸⁶ GSN Exh. 133 at 16.

Network; Fox News Channel; FX Network; Galavision; GSN; HD Theater; Headline News; HGTV; History; Lifetime; MSNBC; MTV; MTV2; Nickelodeon; Oxygen; SoapNet; Speed; Spike TV; SportsNet New York; Syfy; TBS; Telecare; TLC⁸⁷; TNT; Travel Channel; truTV; Turner Classic Movies; TV Land; Universal HD; USA Network; VH1; The Weather Channel; and Yes Network.⁸⁸

20. At the time of GSN's retiering, Cablevision distributed none of its affiliated networks on its least penetrated tier,⁸⁹ the Sports Pak.⁹⁰ At the time of retiering, Cablevision also distributed no general entertainment network on the Sports Pak tier but distributed only sports and sports-related networks on that tier, including: Big Ten Network; CBS College Sports; ESPN Classic; ESPNU; Fight Now; FOX College Sports Atlantic; FOX College Sports Central; FOX College Sports Pacific; FOX Soccer Plus; Fuel; The Golf Channel; GOL TV; Mav TV; MLB Network; NBA TV; Neo Cricket; NHL Network; Outdoor Channel; Sportsman Channel; Tennis Channel; TVG Network; and Versus.⁹¹ At hearing, GSN remained the only general entertainment network that Cablevision has ever distributed on its premium sports tier.⁹²

B. Cablevision's Carriage of GSN

21. Cablevision began distributing GSN pursuant to a written carriage agreement that was effective June 1, 1997 through May 31, 2002, and which provided for a license fee of: {{[REDACTED]}} June-December 1997; {{[REDACTED]}} for 1998; {{[REDACTED]}} for 1999; {{[REDACTED]}} for 2000; {{[REDACTED]}} for 2001; and {{[REDACTED]}} for January-May 2002.⁹³ In March 2002, Cablevision exercised its option to renew the carriage agreement for an "[REDACTED]".⁹⁴ The renewed agreement provided for a per subscriber license fee of: {{[REDACTED]}} June-December 2002; {{[REDACTED]}} for 2003; and {{[REDACTED]}} January-May 2004.⁹⁵ In October 2002, the renewed carriage agreement was extended through

⁸⁷ In the record, TLC is also referred to as The Learning Channel and as Learning Channel.

⁸⁸ CV Exh. 154 at 5. *See also* CV Exh. 117 at 6-7 (identifying 52 networks—all of those listed above minus Daystar, Galavision, HD Theater, Telecare, and Universal, but including Trinity/WTBY—as forming the expanded basic tier during the period February-June 2010).

⁸⁹ At the time of the retiering, the Sports Pak tier had approximately {{[REDACTED]}} subscribers; in comparison, the Gold tier had approximately {{[REDACTED]}} subscribers and the Silver tier had approximately {{[REDACTED]}} subscribers. *See supra* notes 78-79 and 83.

⁹⁰ Singer testified that "none of the networks carried on Cablevision's 'iO Sports & Entertainment Pak' tier between October 2010 and September 2011 was affiliated with (or owned by) Cablevision." Singer Expert Testimony at 15 (emphasis in original); *see also* GSN Exh. 452 (Singer's chart showing that during the period October 2010 through September 2011, none of the networks distributed on its premium sports tier was affiliated with Cablevision).

⁹¹ *See* Singer Expert Testimony at 14; *see also* GSN Exh. 382, Tr. at 1609:12-1614:19 (Montemagno testified about the networks Cablevision distributed as the premium sports tier at the time of the hearing).

⁹² *See* Tr. at 1609:12-19 (at the time of the hearing, Montemagno testified that, except for GSN, the current make-up of the Sports Pak tier is "primarily sports, true sports channels" with a handful of "lifestyle networks" and "outdoorsy channels"); *id.* at 1614:16-19 (Montemagno also confirmed that GSN is the only network on the Sports Pak tier that is an entertainment network and is not a sports or sports-related lifestyle or outdoor network). Subsequent to GSN's retiering, Cablevision launched two non-affiliated networks—one a female-targeted network (OWN) and the other, a sports network (NFL Redzone). *See infra* notes 155 and 242.

⁹³ CV Exh. 4 at 2-3; *see also* Tr. at 1495:12-14 (Montemagno testified that Cablevision first entered into a carriage agreement with GSN in 1997).

⁹⁴ CV Exh. 4 at 11.

⁹⁵ *Id.* at 3.

{{[REDACTED]}}.⁹⁶

22. At its expiration {{[REDACTED]}}, the parties began to negotiate a new agreement. While negotiating, Cablevision continued to carry GSN on the expanded basic tier at the {{[REDACTED]}} per subscriber license fee, and GSN agreed to such terms of carriage.⁹⁷ In its negotiating, GSN sought to gain from Cablevision a higher license fee⁹⁸—a license fee that GSN insisted was in line with the license fees GSN was receiving from similarly sized MVPDs.⁹⁹ In exchange for paying a higher license fee, Cablevision countered by seeking from GSN a new Most Favored Nation (MFN) clause {{[REDACTED]}}.¹⁰⁰ Cablevision also rejected GSN's counteroffer of {{[REDACTED]}}.¹⁰¹ Finally, Cablevision countered by informing GSN that Cablevision “would be willing to compromise on rates, as long as GSN would provide [Cablevision] with {{[REDACTED]}} MFN we were seeking.”¹⁰²

23. The parties' negotiations ultimately reached an impasse because of Cablevision's

⁹⁶ *Id.* at 12. See also Montemagno Testimony at 6; Tr. at 1500:4-8 (Montemagno testified that when the 1997 carriage agreement expired, Cablevision “extended it in 2002 . . . until {{[REDACTED]}}”).

⁹⁷ See Montemagno Testimony at 21 (Montemagno testified that “[i]n the absence of a contract, it is [Cablevision's] view that an MVPD may place a programming network on any tier it sees fit, and a programming network implicitly agrees to that placement with the continued authorization of its signal.”).

⁹⁸ See CV Exh. 19 at 1 (6/15/05 internal Cablevision chart comparing its carriage proposal as of May 13, 2005 to GSN's carriage proposal as of June 10, 2005 which shows that GSN sought a license fee of {{[REDACTED]}} for 2005 that {{[REDACTED]}} 2011, when the license fee {{[REDACTED]}}).

⁹⁹ See Gillespie Testimony at 45 (Gillespie testified that although Cablevision was paying GSN {{[REDACTED]}}); GSN Exh. 93 at 1 (Gillespie advised Chang that “{{[REDACTED]}}”). See also *ibid.* (in GSN's view, the {{[REDACTED]}} per {{[REDACTED]}} subscribers that Cablevision had been paying since expiration of the carriage agreement on {{[REDACTED]}}), was “{{[REDACTED]}}”); *id.* at 2 (Gillespie also advised Chang that “[o]ur goal prior to learning of [Cablevision's] planned adverse repositioning of GSN was to seek opportunities to bring Cablevision's rates in-line with similar size distributors in the {{[REDACTED]}}/sub range while keeping our broad distribution . . .”).

¹⁰⁰ An MFN clause is a provision in a carriage agreement that grants a distributor the right to be offered any more favorable rates, terms, and/or conditions of carriage that the vendor subsequently offers or grants to another distributor. See Joint Glossary at 3; Dolan Testimony at 70 (Dolan testified that “in many cases networks have clauses in their contracts called MFNs, and that's most favored nations, and so the network could say that we can't give you the rate you want because then we'd have to lower everybody else's rate.”). Montemagno testified that a {{[REDACTED]}} MFN “{{[REDACTED]}}” Tr. at 1503:14-20. See also Montemagno Testimony at 7; Tr. at 1502:4-7 (Montemagno testified that Cablevision was “{{[REDACTED]}}”).

¹⁰¹ See Montemagno Testimony at 7 (Montemagno testified that “GSN offered Cablevision {{[REDACTED]}}” which “was not acceptable to Cablevision”); see also CV Exh. 19 at 2.

¹⁰² Montemagno Testimony at 9; see also Montemagno Testimony at 8 (Montemagno testified that “Cablevision made a counter offer to GSN {{[REDACTED]}}. Cablevision's offer also included {{[REDACTED]}} MFN; . . . GSN rejected this offer.”); CV Exh. 33 (11/6/07 email from Montemagno to Gillespie which attached a carriage proposal that provided {{[REDACTED]}} license fee of {{[REDACTED]}}), and in which Montemagno stated that “[i]f this were all backed by the MFN in the attached, it's something we might do”).

insistence on the inclusion of {{[REDACTED]}} MFN clause. GSN was unwilling to include such a provision in a new carriage agreement¹⁰³ notwithstanding GSN's calculation that it would lose approximately {{[REDACTED]}} in annual license fee revenue if Cablevision were to drop GSN but “{{[REDACTED]}}.”¹⁰⁴

24. On February 11, 2009, two years before GSN's retiering, Montemagno, as Cablevision's negotiator for the carriage agreement, advised Gillespie, his counterpart at GSN, that GSN should not pursue further a new agreement that did not include {{[REDACTED]}} MFN or one that sought a license rate higher than the {{[REDACTED]}} that Cablevision was paying because, by doing so, GSN ran the risk of being dropped by Cablevision rather than being carried at the terms existing in the ongoing at-will carriage arrangement.¹⁰⁵ That advice from Montemagno apparently extinguished any further negotiations on a new agreement.¹⁰⁶ For {{[REDACTED]}}, Cablevision carried GSN on the expanded basic tier at the {{[REDACTED]}} license rate. As of the date of the hearing in July 2015, Cablevision had carried GSN at-will at the {{[REDACTED]}} license rate for {{[REDACTED]}}, and continues to do so.¹⁰⁷

¹⁰³ See Montemagno Testimony at 8 (Montemagno testified that “[a]lthough we had a number of additional meetings throughout {{[REDACTED]}},” Cablevision and GSN “remained unable to agree on terms for a new carriage agreement.”); Gillespie Testimony at 48 (Gillespie testified that the principal thing that Cablevision was seeking in a new carriage agreement that was not included in the expired contract was “an MFN” but GSN was “[u]nwilling to give an MFN {{[REDACTED]}}”). See also CV Exh. 40 at 1-2 (2/27/08 Montemagno handwritten meeting notes that Gillespie “[s]aid they need to reset rates since we have been paying way to[o] low” and that Gillespie also “said he needs to get to an {{[REDACTED]}} & will [do] MFN {{[REDACTED]}}” but that Rutledge “said no way, we expect to pay no more” and that Rutledge also “said he doesn’t know if working together in other areas would fix MFN”).

¹⁰⁴ GSN Exh. 93 at 1; see also Gillespie Testimony at 109-11 (Gillespie believed that GSN would have fared better financially by deauthorizing Cablevision than by accepting the inclusion of {{[REDACTED]}} MFN in a new GSN-Cablevision carriage agreement).

¹⁰⁵ See CV Exh. 54 (2/11/09 Montemagno handwritten notes that he told Gillespie it was “best to continue to coast at the current {{[REDACTED]}} [and] remain ‘under the radar’ – if he forces me to take back a proposal w/rate increases prospectively, our executives then will likely question the value of continuing to carry it,” and that Gillespie “agreed with me for the time being”); Gillespie Testimony at 48-49 (Gillespie testified that he “felt that [GSN’s] carriage was threatened if we were to . . . bring forth a proposal for carriage at higher rates” but “so long as we didn’t raise our rate, we had an understanding that carriage would continue where it was at the rate of {{[REDACTED]}}”). See also Montemagno Testimony at 14 (Montemagno testified that he “knew that if I had to justify the current cost to Mr. Rutledge—let alone the increase in fees that GSN was seeking—he was likely to discontinue carriage of the service.”); Tr. at 1507:10-13 (Montemagno testified that he told Gillespie “that if he were to press for increases in programming fees, that [Cablevision] executive staff would likely really take a hard look at what we were paying in the relationship[] [a]nd whether it was worth continuing.”); *id.* at 1629:15-16 (Montemagno testified that he “said if [GSN] pushed for an increase in the rate then [Cablevision] might make a decision not to carry [GSN] anywhere”); GSN Exh. 93 at 1 (Gillespie informed Chang that “Cablevision’s negotiating stance over the past {{[REDACTED]}} has been an insistence on {{[REDACTED]}} MFN {{[REDACTED]}}. Tom Montemagno has advised that attempts to negotiate a deal at rates without these assurances would put GSN’s carriage at risk.”).

¹⁰⁶ Tr. at 1507:23-25 (Montemagno testified that GSN did not make any carriage proposals to Cablevision after February 2009); Montemagno Testimony at 14 (Montemagno testified that “[a]t a February 11, 2009 meeting, I told Mr. Gillespie, that considering the economic climate and Cablevision’s continuing goal of keeping programming costs contained, seeking higher fees would potentially highlight GSN as a target for removal from the channel lineup . . . When I explained these circumstances to Mr. Gillespie, he dropped his request for higher fees.”). See also GSN Exh. 93 at 1 (Gillespie advised Chang that GSN’s “last rate conversations [with Cablevision] took place in late 2009.”).

¹⁰⁷ See Montemagno Testimony at 29 (Montemagno testified that when Cablevision made the retiering decision in 2010, GSN “had been out of contract for {{[REDACTED]}}”).

C. Cablevision Retiered GSN on the Basis of Non-Affiliation

1. The Retiering Conduct

a. Background

25. In 2010, Cablevision faced increasing economic pressures on its programming budget.¹⁰⁸ At hearing, Montemagno testified that 2010 was “a transformational time in the industry” because “[b]roadcasters were now asking for significant [retransmission consent] fees that [Cablevision] never paid before” and “sports fees . . . were going up dramatically” as well.¹⁰⁹ For Cablevision, programming offered by broadcast stations and sports networks was “must-have” and “commercially critical” for its cable systems.¹¹⁰ Also during this period, Montemagno testified that “programming networks ha[d] become increasingly concentrated in large media conglomerates” such that programming vendors would “‘bundle’ their [network] services to require distributors to purchase them all, rather than choosing, and negotiating for, the services they believe have the most value for their customers.”¹¹¹

26. Despite such economic pressures, Cablevision’s net earnings for the second quarter of 2010 grew 5.8% to \$1.02 billion compared to the prior year, and for the third quarter of 2010 grew 5.6% to \$1.808 billion compared to the prior year.¹¹² In 2010, Cablevision was typically “striving to perform financially well . . . and that includes trying to generate more revenue as well as cut expenses.”¹¹³

¹⁰⁸ See Dolan Testimony at 96 (Dolan testified that in 2010, “even through now, there has been a great deal of pressure on programming rates, particularly from the networks as they began to become more aggressive with their retransmission consent demands”). Cf. Chang Testimony at 97 (Chang testified that in 2010 “[t]he general trend in the industry was that programming costs were rising at a relatively high rate.”). See also Gillespie Testimony at 124-25 (Gillespie testified that although GSN was generally “concerned” with the trend’s impact on MVPDs’ programming budgets, the trend was unrelated to the reasons—i.e., “our ratings and our license fees”—that Cablevision had given to GSN for its retiering decision.).

¹⁰⁹ Tr. at 1508:14-1509:4.

¹¹⁰ See Bickham Testimony at 31 (Bickham testified that “[s]ome programming is more important than other programming from the standpoint of [ac]quiring and holding on to customers . . . And sports in general is the kind of programming that will cause subscribers to leave you if you don’t have it.”); Montemagno Testimony at 11 (Montemagno testified that “the lion’s share of [Cablevision’s] subscribers expect to find the major broadcast networks on our system”); *id.* at 18 (Montemagno described “‘must have’ networks” as “certain sports programming”). See also *id.* at 10 (Montemagno testified that “[p]rogrammers, especially those with a great deal of leverage, such as the broadcast stations and networks with sports programming, were aggressively raising their rates during the 2009-10 period and thereafter, which limit[ed] Cablevision’s budget for other, less crucial programming.”).

¹¹¹ Montemagno Testimony at 10-11; see also Tr. at 1509:8-13 (Montemagno testified that “[b]efore [2010] I would have individual agreements with . . . each network. And now, ESPN, VIACOM, Turner, NBC, Fox, they all were doing . . . what I’m going to call a portfolio deal. Where you had to carry -- you had to do one agreement for everything. And they leveraged that by asking for significant rate increases.”). During this period, Montemagno testified that Cablevision’s programming budget also was impacted by “intense competition from MVPDs overbuilding our systems.” Montemagno Testimony at 10; see also Tr. at 1510:4-10 (Montemagno testified that Cablevision experienced “significant competition from . . . satellite providers . . . [and] Verizon overbuilt our operation by more th[a]n 50 percent. And they were very, very aggressive in their pricing. That put lots of pressure on us that we basically had to match pricing.”).

¹¹² See Dolan Testimony at 98, 101.

¹¹³ Dolan Testimony at 97. See also *id.* at 96 (Dolan testified that during 2010, Cablevision was “trying to trim our programming budget as well as all of our budgets . . .”).

b. Targeting GSN

27. On July 15, 2010, during a Cablevision finance meeting, Bickham instructed his subordinates “to give consideration to potentially dropping Game Show Network.”¹¹⁴ Bickham testified that there was no specific pressure coming from his superiors—Dolan and Rutledge—to scale back programming costs or reduce the 2011 programming budget.¹¹⁵ Nor was a specific amount of cost savings given as the reason for his instruction.¹¹⁶ Rather, Bickham singled out GSN for elimination from other out-of-contract networks¹¹⁷ because he determined that GSN did not provide “must-have programming”¹¹⁸ but offered only “[r]eruns of old programming.”¹¹⁹

28. On July 22, 2010, Montemagno sent Bickham a memorandum (Montemagno Memorandum) that summarized the “collective input from both Programming and Product Mgt. [teams]” regarding the “relevant background, facts, and considerations for evaluating [Cablevision’s] carriage situation with the Game Show Network and how we feel about the possibility of removing it from our lineups.”¹²⁰ The Montemagno Memorandum noted that Cablevision carried GSN on the expanded basic tier to approximately { [REDACTED] } subscribers, and that since expiration of the carriage agreement in { [REDACTED] } at the license rate of { [REDACTED] }, Cablevision had “continued to pay (and accrue) { [REDACTED] } despite various attempts by GSN to engage in renewal discussions at escalating rates.”¹²¹ In the Memorandum, Montemagno pointed out to Bickham that Cablevision was “forecasted to pay [GSN] { [REDACTED] } in 2010 (i.e., { [REDACTED] } per month).”¹²² Montemagno further noted that, as of July 2010, it had “been well over a year since GSN has made any attempts at concluding a renewal (i.e., we told them that they should be happy to be carried at the current payment rate and if they put forth an ask, they will

¹¹⁴ CV Exh. 117 at 3. *See also* Tr. at 1511:3-5 (Montemagno testified that during the July 2010 meeting, Bickham “told me that he’d like to consider dropping Game Show Network. And he asked me to prepare a recommendation to support his decision.”). Montemagno also testified that CV Exh. 119 “is the document that I prepared in response to Mr. Bickham’s question to me. And it contains what I viewed as the relevant information and considerations that should go into that decision, whether to continue to carry or to drop the Game Show Network.” *Id.* at 1511:12-17.

¹¹⁵ Bickham Testimony at 40 (Bickham testified that there had been no direction from Dolan or Rutledge that programming costs needed to be scaled back).

¹¹⁶ Bickham testified that while dropping GSN would “reduce [Cablevision’s] overall cost and improve cash flow of the business,” he specifically targeted GSN because in GSN’s “case there was no contract so it was a fairly easy network to look at” for elimination from Cablevision’s lineup. *Id.* at 38. *See also id.* at 95 (Bickham testified that because “Game Show was out of contract,” Cablevision “had the rights to eliminate it or retier it.”). Bickham further testified that there was no significance to saving { [REDACTED] } by dropping GSN “other than that was what was possible.” *Id.* at 45.

¹¹⁷ Bickham testified the Cablevision routinely and “constantly look[ed] at programming that was marginal from a must-have standpoint and evaluat[ed] the cost of the programming as to whether or not it was worth it,” but it was “not possible generally [for Cablevision] to drop or network or to reposition a network that [was] in contract unless [Cablevision] ha[d] drop rights or repositioning rights.” *Id.* at 32, 38. *See also* Montemagno Testimony at 21 (Montemagno testified that “[w]hen we consider repositioning programming networks to save costs, we only look at networks that are out of contract, or networks that have agreements that grant us carriage flexibility.”).

¹¹⁸ Bickham Testimony at 32 (Bickham testified that he viewed GSN’s programming as “marginal” and not as “must-have programming”).

¹¹⁹ *Id.* at 57.

¹²⁰ CV Exh. 119 at 1; *see also* Tr. at 1511:12-17.

¹²¹ CV Exh. 119 at 3.

¹²² *Ibid.*

immediately be put in the spotlight and risk continued carriage).”¹²³

29. The Montemagno Memorandum described GSN’s “[k]ey [p]rogramming” as a “[c]ombination of older game show reruns, more contemporary game show reruns, and original game shows with play along capability for prizes via computer,” noting that according to GSN, “a few thousand Cablevision customers regularly participate as registered play along viewers.”¹²⁴ Statistically, based on set-top box (STB) data¹²⁵ for the period February through June 2010, according to the Memorandum, GSN “[r]anked #132 among all [517¹²⁶] net[work]s we carry.”¹²⁷ This placed GSN’s performance “in the proximity of networks like Headline News, MSG Varsity, Soap Net and some of the international networks and in the very bottom among iO Family networks.”¹²⁸ “However,” the Memorandum noted

¹²³ *Ibid.* See also Gillespie Testimony at 46-47 (Gillespie testified that Montemagno told him that “if [GSN] raised a deal that . . . contemplated higher rates that . . . it would cause a problem because [Montemagno] would have to take it to senior management. And therefore [GSN’s] carriage might be in jeopardy.”).

¹²⁴ CV Exh. 119 at 3. In the Memorandum, Montemagno identified as “[o]lder shows”—*Hollywood Squares, Match Game, Family Feud, Password, and \$100,000 Pyramid*; as “[c]ontemporary reruns”—*Deal or No Deal, Who Wants to be a Millionaire, Jeopardy, and Wheel of Fortune*; and as “[o]riginals/[r]emakes”—*Late Nite Liars, Newlywed Game, Baggage, Catch 21, Lingo, GSN Live, and High Stakes Poker*. *Ibid.*

¹²⁵ STB data is data that is collected digitally by MVPDs from their subscribers’ set-top cable boxes. See Joint Glossary at 4; Tr. at 2143:10-17 (Broussard testified that “if you’re a paid television subscriber, you unfortunately have to have certain equipment in your house, and the main piece of equipment is a set-top box . . . so at any given time a paid television operator can determine what box is tuned to what channel. And so when they aggregate all that information, they can tell you at any given time, there were X number of households that are tuned to channel 5, for example.”). In making carriage decisions, Cablevision favors STB data over Nielsen data. See Dolan Testimony at 78 (Dolan testified that he “put more weight on the box data than I do on the Nielsen data” and “[n]ot that much” weight on Nielsen data); Montemagno Testimony at 18-19 (Montemagno testified that “[u]nlike Nielsen data, the set-top box viewership data reflect what is actually happening in the households of [Cablevision’s] subscribers. I use set-top viewership data when I am in negotiations with programming networks, and when I am making recommendations about carriage and placement to senior management.”); Tr. at 1675:6-9 (Montemagno also testified that Nielsen ratings are “not something that I factor very heavily in carriage decisions and negotiations.”); *id.* at 1679:14-18 (Montemagno further testified that, in determining the value to Cablevision of carrying a network, “one of the things we look at . . . is the set top box data.”). See also Tr. at 1204:3-10 (Brooks testified that Nielsen data is the industry standard for the “[m]easurement of TV audiences” in the United States).

¹²⁶ See GSN Exh. 68 at 5, 9 (7/21/10 internal Cablevision email attaching a spreadsheet that shows that GSN was ranked 132nd among 517 networks distributed by Cablevision; a ranking that placed GSN among the top 25 percent of networks distributed by Cablevision). But see *id.* at 11, 23 (showing that GSN ranked 70th among 547 networks distributed by Cablevision; a ranking that placed GSN among the top 13 percent of networks distributed by Cablevision). See also Tr. at 1571:20-1579:3 (Montemagno testified regarding the two different STB data rankings and he confirmed that both were available to him when he prepared the GSN carriage assessment memorandum). The Presiding Judge finds that there is no meaningful difference in these two GSN rankings—i.e., being ranked 70th or 132nd out of more than 500 networks. Each of these GSN rankings by Cablevision is significant because each ranking shows that, at the time of retiering, GSN programming was highly regarded compared with all network programming distributed by Cablevision.

¹²⁷ CV Exh. 119 at 3.

¹²⁸ *Ibid.* See also Montemagno Testimony at 19** (Montemagno testified that “GSN ranked 132nd of all networks that Cablevision carries (and 48th out of 51 networks on the expanded basic tier, excluding those networks that were available on a part-time basis, HD-only networks, and networks that were not available in every system within our footprint), or roughly on par with minimally viewed foreign language networks.”). ** Although Montemagno testified that GSN ranked 48th out of 51 networks, the document on which he relied—CV Exh. 117—shows that GSN ranked 49th out of 52 networks; the Presiding Judge finds that these rankings are equivalent but adopts the one set forth in CV Exh. 117.** In addition, out of the 52 networks Cablevision then distributed on the expanded basic tier, Headline News ranked 47th (and 112th among all 517 networks distributed by Cablevision), MSG Varsity ranked 48th (and 113th), MSG ranked 50th (and 141st), SoapNet ranked 51st (and 169th), and Speed ranked 52nd (and 180th). CV Exh. 117 at 6-7. Except for Speed, which fell just short in its ranking, each network that Cablevision

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that, based on the number of viewing hours, GSN's performance was "more in line with the bottom 40% of iO Family networks, suggesting that the few viewers that watch appear to watch it with regularity."¹²⁹

30. The Montemagno Memorandum concluded that "the removal of GSN from our systems will result in minimal customer outcry and we can easily withstand the activity."¹³⁰ But the Memorandum also noted that the GSN carriage assessment team was "somewhat concerned" that Sony, GSN's co-owner, might {{ [REDACTED] }}.¹³¹ Montemagno warned Bickham that "[t]hey could very well insist {{ [REDACTED] }} that we sign a new GSN deal at higher rates, retroactive payments, guaranteed carriage, etc."¹³² The Memorandum went on to advise that "[i]f everyone is comfortable taking on the risks associated with {{ [REDACTED] }}", then we are prepared to pursue deletion [of GSN] if Mgt. desires to do so."¹³³ Alternatively, Cablevision's product management team proposed that, rather than drop GSN, consideration be given to "retention of GSN" but repositioning the network on the Silver tier.¹³⁴ That alternate plan would result in savings of approximately {{ [REDACTED] }}, a substantial portion of the {{ [REDACTED] }} annualized GSN license fees that Cablevision would gain by dropping GSN.¹³⁵ In July 2010, Cablevision decided to neither drop nor re-tier GSN.¹³⁶

c. Cablevision's 2011 Programming Budget

31. In 2011, Cablevision's programming budget was approximately {{ [REDACTED] }}.¹³⁷ The 2011 budget reflected a 6.4 percent increase of {{ [REDACTED] }} in programming costs above

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distributed on the expanded basic tier during the period February-June 2010, including GSN, ranked among the top third of all networks distributed by Cablevision.

¹²⁹ CV Exh. 119 at 3; *see also* Montemagno Testimony at 19 (Montemagno testified that he had "also noted that there was a small group of viewers that watched GSN with regularity, such that the overall viewership data were not as grim as the household count" suggested).

¹³⁰ CV Exh. 119 at 3 (Cablevision also was "not too concerned about our lack of carriage [of GSN] while our competitors continue to offer it.").

¹³¹ *Ibid.*

¹³² *Ibid.* (boldface and underline in original). The Montemagno Memorandum noted that "{{ [REDACTED] }}." *Ibid.* But Montemagno concluded in his memorandum that if Cablevision {{ [REDACTED] }}, {{ [REDACTED] }}, {{ [REDACTED] }}." *Ibid.* In addition, the Montemagno Memorandum advised Bickham that if Cablevision had a future "{{ [REDACTED] }}", lack of GSN carriage could also complicate these efforts." *Id.* at 4.

¹³³ *Ibid.*

¹³⁴ *See ibid.*

¹³⁵ *Ibid.* (noting concern that under the alternate proposal "GSN could still de-authorize." The Memorandum also noted that based on STB data for the week of July 12-18, 2010, "12% of iO Family subscribers tuned into GSN, 13% of iO Silver subs, and 16% of iO Gold" subscribers. *Id.* at 3. *See also* Montemagno Testimony at 20 (Montemagno testified that "at the suggestion of the product management team, I raised the possibility of re-tiering GSN to iO Silver or Gold, rather than dropping it altogether, noting that such a move would save as much as {{ [REDACTED] }} of the {{ [REDACTED] }} in savings sought by Mr. Bickham.").

¹³⁶ *See ibid.* (Montemagno testified that "Mr. Bickham took my memorandum under consideration but made no decision at that time."); Tr. at 1667:23-1668:12 (Montemagno testified that although he had "raised the possibility in my July memo to Mr. Bickham" of moving GSN to the Silver tier, "we did not pursue that.").

¹³⁷ CV Exh. 136 at 2.

2010.¹³⁸ Approximately 70 percent of the programming budget increase was due to contractual license rate increases (unrelated to GSN) and growth in the number of Cablevision subscribers on which license fees would be calculated.¹³⁹

32. Cablevision's 2011 programming budget related to GSN "[a]ssumed no increase to the current payment rate" of "{[REDACTED]}", which licensing payments to GSN amounted to approximately one-quarter of 1 percent of the total budget.¹⁴⁰ The 2011 budget also assumed that GSN's carriage would remain on the expanded basic tier.¹⁴¹ But there also was an alternative proposal of either dropping GSN, resulting in savings of "{[REDACTED]}", or moving GSN to the Silver or Gold tiers, resulting in savings of "{[REDACTED]}".¹⁴² The 2011 programming budget reflected the same cost figures,¹⁴³ made the same assumptions, and included the same alternative proposal for {[REDACTED]}.¹⁴⁴ {[REDACTED]} is a non-affiliated documentary network that Cablevision also distributed on the expanded basic tier.¹⁴⁵

33. On November 8, 2010, Rutledge, Bickham, Budill, and Montemagno met to discuss Cablevision's 2011 programming budget.¹⁴⁶ With an approximately {[REDACTED]} projected increase in its programming costs, Cablevision was looking for ways to trim its 2011 programming budget.¹⁴⁷ During the meeting, Rutledge suggested with respect to four non-affiliated networks distributed on the expanded basic tier that had expired or expiring carriage agreements—specifically, GSN, {[REDACTED]}, {[REDACTED]}, and {[REDACTED]}¹⁴⁸—(1) "mov[ing] them to the sports tier,"¹⁴⁹ (2) {[REDACTED]}

¹³⁸ *Ibid.*; Tr. at 1657:5-17.

¹³⁹ CV Exh. 136 at 2 (contractual license rate increases accounted for 57.9% and growth in Cablevision subscribers accounted for 11.9% of the increase in Cablevision's 2011 programming budget).

¹⁴⁰ *Id.* at 4. *See also* Bickham Testimony at 94 (Bickham testified that GSN constituted ".26" percent of Cablevision's 2011 programming budget).

¹⁴¹ *See* CV Exh. 136 at 8.

¹⁴² *Ibid.*

¹⁴³ *Ibid.* (for {[REDACTED]}, the 2011 programming budget assumed no increase in the 2010 effective rate of {[REDACTED]}, which accounted for 0.26% (or {[REDACTED]}) of the total 2011 budget).

¹⁴⁴ *Ibid.* *See also* Montemagno Testimony at 22 (Montemagno testified that "[t]he potential savings associated with removing both GSN and {[REDACTED]}—about {[REDACTED]} if either programming network were dropped or {[REDACTED]} if either programming network were repositioned to iO Silver or Gold—are reflected in the 2011 Programming Budget dated November 8, 2010, a copy of which is CV Exh. 136.").

¹⁴⁵ *See* CV Exh. 816—Tim Brooks and Earle Marsh, The Complete Directory to Prime Time Network and Cable TV Shows 1946-Present (9th ed. 2007) (Cable Directory) at 1421. At hearing, Brooks testified that the Cable Directory is "an encyclopedia of all series that have run on any of the major networks, either cable or broadcast since their inception in the evening hours." Tr. at 1136:18-1137:1. Cablevision moved the Cable Directory into evidence and received confirmation from Brooks that in the television industry, the Cable Directory is widely acknowledged as a leading resource of its type. Tr. at 1175:9-1176:4.

¹⁴⁶ Jim Nuzzo, Cablevision's "executive vice president of financial planning" also attended the meeting. Tr. at 1519:14-22; *see also* Montemagno Testimony at 22 (Montemagno testified that "[o]n November 8, 2010, Mr. Rutledge, Mr. Bickham, Mr. Nuzzo, Mr. Budill, and I met to review the 2011 Programming Budget."); CV Exh. 136 at 22 (11/8/10 Montemagno handwritten meeting notes listing "Tom R, John B, Jim Nuzzo, Mac & I" as attendees).

¹⁴⁷ Tr. at 1517:10-25 (Montemagno testified that during the November 2010 meeting, "we talked about for 2011 the anticipated programming cost increases . . . [a]nd we talked about what actions, what channels might we change our distribution arrangement with to save money."); Montemagno Testimony at 20 (Montemagno testified that "as a part of our annual program budgeting process, the programming department undertook its ordinary course evaluation of programming cost savings opportunities on Cablevision's channel lineups").

¹⁴⁸ GSN's carriage agreement expired on {[REDACTED]}; {[REDACTED]}'s agreement expired on {[REDACTED]}; and {[REDACTED]}'s and {[REDACTED]}'s respective agreement was due to expire on {[REDACTED]}. CV Exh. 99 at 6, 8; *see also* CV Exh. 136 at 4. Montemagno testified that when Cablevision "consider[s]

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}, (3) moving them to the Silver tier, or (4) dropping them.¹⁵⁰ The retiering proposal made and considered at the November 8, 2010 meeting was to move all four networks—GSN, {{ }}, {{ }}, and {{ }}—as a unit to the Sports Pak tier.¹⁵¹ Conversely, at the November 8, 2010 programming budget meeting, there was no consideration given to moving GSN or any other network separately or individually to the Sports Pak tier.¹⁵²

34. In the 2011 programming budget, Cablevision identified {{ }} and {{ }} as being among the “30 most expensive services account[ing] for 81% of total programming costs.”¹⁵³ At the November 8, 2010 meeting, Cablevision decided not to take any of the proposed cost-savings actions against {{ }}.¹⁵⁴ Cablevision also did not act against {{ }} but continued at-will carriage of {{ }} on the expanded basic tier at the existing license rate of {{ }}.¹⁵⁵ With respect to

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repositioning programming networks to save costs, we only look at networks that are out of contract, or networks that have agreements that grant us carriage flexibility.” Montemagno Testimony at 21. Cablevision’s affiliated networks—AMC, IFC, and Sundance—also had carriage agreements that were due to expire on {{ }}. CV Exh. 136 at 4. The 2011 programming budget reflected license fees of {{ }} for AMC, {{ }} for IFC, and {{ }} for Sundance. *Ibid.* The 2011 programming budget also reflected license fees of {{ }} in 2010 and {{ }} in 2011 for WE tv; and a license fee of {{ }} for Wedding Central in both years. *Id.* at 12, 14.

¹⁴⁹ Tr. at 1519:4-10 (Montemagno testified that during the November 8, 2010 programming budget meeting, Rutledge suggested that “{{ }}, GSN and {{ }} . . . move . . . to a sports tier”).

¹⁵⁰ See CV Exh. 136 at 22; Tr. at 1684:5-22. See also Tr. at 1657:5-21 (Montemagno confirmed that it was the {{ }} increase in programming costs in the 2011 programming budget that Cablevision was “trying to manage against” by “looking at {{ }} and GSN and whether cuts could be made?”); Bickham Testimony at 94-95 (Bickham testified that his focus during the November 2010 meeting was on the “increase budgeted year over year . . . as opposed to . . . the t[otal] cost of programming,” and that Cablevision’s effort to trim “3 percent of that [increase]” was “not an insignificant number”); Dolan Testimony at 217-19 (Dolan testified that “it’s very difficult to cut programming budgets,” and so the {{ }} Cablevision saved by retiering GSN was “certainly a material amount of money” cut from Cablevision’s 2011 programming budget, which exceeded {{ }}).

¹⁵¹ Tr. at 1662:1-19 (Montemagno testified that at the November 8, 2010 programming budget meeting, the discussion was about whether to move “[a]ll of those four” networks—{{ }}, {{ }}, GSN, and {{ }}—“to a Sports Tier” and not about whether to move any one of them).

¹⁵² *Ibid.* See also Bickham Testimony at 67 (Bickham testified that prior to the November 8, 2010 budget meeting, he could not “recall any” instance where Cablevision had considered moving GSN to the Sports Pak tier). During and subsequent to the November 8, 2010 meeting, Bickham testified that Cablevision did not consider dropping or retiering WE tv or any other Rainbow network as a cost-savings measure. *Id.* at 104.

¹⁵³ CV Exh. at 136 at 10. In addition, the combination of Cablevision’s affiliated sports networks, MSG and MSG Plus, with a license fee of {{ }}, was listed first among the “30 most expensive services” in the 2011 programming budget. *Ibid.* See also Tr. at 1619:13-1620:6 (Montemagno testified that Cablevision was scheduled to pay the most money in 2011 to MSG and MSG Plus as “combined”).

¹⁵⁴ The 2011 programming budget reflected a license fee of {{ }} for {{ }}. CV Exh. 136 at 10. Montemagno testified that at the November 8, 2010 meeting, Cablevision “discussed and decided” not to act against {{ }}, which “{{ }},” because “{{ }},” and so Cablevision “{{ }}” if it retiered {{ }}. Tr. at 1663:4-14. The outcome of the November 8, 2010 meeting was that {{ }} would not be retiered but would remain on the expanded basic tier. *Id.* at 1663:5. See also CV Exh. 136 at 22.

¹⁵⁵ See *id.* at 4; Tr. at 1663:15-19 (Montemagno testified that {{ }} was “{{ }},” and so Cablevision was “{{ }}”). At the November 8, 2010 meeting, Montemagno also testified that, with respect to the affiliated Rainbow networks, it was agreed that in the

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GSN and {{[REDACTED]}}, Cablevision stood to achieve “potential savings” of approximately “{{[REDACTED]}}” by dropping “either programming network . . . or {{[REDACTED]}} if either programming network were repositioned to iO Silver or Gold.”¹⁵⁶ At the November 8, 2010 meeting, Cablevision decided “to drop” {{[REDACTED]}} but not GSN.¹⁵⁷

d. The Retiering Decision

35. By November 23, 2010, with respect to GSN and {{[REDACTED]}}, Cablevision was implementing the carriage decisions it had made after the November 8, 2010 programming budget meeting.¹⁵⁸ Cablevision decided that “plans should be prepared based on Cablevision no longer carrying {{[REDACTED]}} upon expiration of our current agreement on {{[REDACTED]}}.”¹⁵⁹ {{[REDACTED]}} was scheduled to meet with Cablevision on November 29, 2010, and “the formal approval to proceed with the plan” to drop {{[REDACTED]}} would “be given” following the scheduled meeting.¹⁶⁰ Cablevision subsequently reversed its decision to drop {{[REDACTED]}}, entered into a new carriage agreement with {{[REDACTED]}} at {{[REDACTED]}} licensing cost, and continued to carry {{[REDACTED]}} on the expanded basic tier.¹⁶¹

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renewal of their expiring carriage agreements, the license rates would “{{[REDACTED]}}.” See CV Exh. 136 at 22; Tr. at 1684:25-1685:2. In addition, Montemagno testified that Cablevision also decided at the meeting that it was “not interested now” in distributing the Oprah Winfrey Network (OWN). CV Exh. 136 at 22. Yet shortly thereafter Cablevision launched OWN. See Montemagno Testimony at 23 (Montemagno testified that Cablevision decided “in December 2010, to launch another unaffiliated women’s network, OWN (the Oprah Winfrey Network).”).

¹⁵⁶ Montemagno Testimony at 22.

¹⁵⁷ Tr. at 1520:3-4. Montemagno testified that Cablevision did not make the same decision for GSN as it had made for {{[REDACTED]}} but decided instead to retier GSN. *Id.* at 1519:23-1520:4.

¹⁵⁸ CV Exh. 141 at 3 (11/23/10 internal Cablevision email regarding “the latest on {{[REDACTED]}} and GSN”). The Presiding Judge rejects as erroneous Montemagno’s conflicting hearing testimony—which Montemagno himself contradicts—that “Cablevision made its decision to retier GSN” from the expanded basic tier to the premium sports tier in “July 2010.” Tr. at 1508:1-6. The record unequivocally shows that the retiering decision was made in November 2010. See Tr. at 1518:21-1519:25 (Montemagno testified that the decision to retier GSN from the expanded basic tier to the premium sports tier was an outcome of the November 8, 2010 meeting regarding the Cablevision’s 2011 programming budget); *id.* at 1653:15-18 (Montemagno confirmed that when making the November 2010 retiering decision, Cablevision revisited GSN’s July 2010 performance); *id.* at 1654:10-1655:4 (Montemagno similarly confirmed that in November 2010, Cablevision took another look at GSN and from there made the retiering decision); *id.* at 1654:13-1656:3 (Montemagno also confirmed that the information reflected in CV Exh. 154, which is dated December 16, 2010, is the information that Cablevision relied on in making the retiering decision). See also Montemagno Testimony at 20 (Montemagno testified that “{{[REDACTED]}}” to drop or retier GSN); *cf.* Bickham Testimony at 205 (Bickham’s testimony reflects that the GSN carriage decisions made in July 2010 and November 2010 were distinct).

¹⁵⁹ CV Exh. 141 at 3.

¹⁶⁰ *Ibid.* See also Tr. at 1521:16-19 (Montemagno testified that after {{[REDACTED]}} was notified of Cablevision’s decision to drop the network upon expiration of their carriage agreement, {{[REDACTED]}} “did not want us to pursue it,” and instead “asked to come in, meet with us, and negotiate a solution.”).

¹⁶¹ Cablevision subsequently decided to continue broad distribution of {{[REDACTED]}} because {{[REDACTED]}} “cut their [license] fee by {{[REDACTED]}}.” *Id.* at 1521:23-25. See also Montemagno Testimony at 22 (Montemagno testified that “[s]ubsequent to the November 8 meeting, we decided to drop the {{[REDACTED]}} altogether” but once “{{[REDACTED]}} agreed to {{[REDACTED]}} . . . we were able to conclude a new carriage agreement.”); CV Exh. 121E at 1 (12/6/10 memorandum to Bickham from Budill that references the

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36. By November 23, 2010, Cablevision had also decided that “plans should be prepared based on Cablevision repositioning GSN to the Sports Pak tier effective [February 1, 2011].”¹⁶² In contrast to the reversal of its decision to drop {{[REDACTED]}}, Cablevision’s decision to move GSN from the expanded basic tier to the Sports Pak tier was “a go.”¹⁶³ Cablevision planned to notify GSN of the retiering decision on December 6, 2010, the same date that Cablevision anticipated that the unannounced billing message about the retiering would reach Cablevision subscribers.¹⁶⁴

37. The preponderance of record evidence shows that the decision to move GSN from the expanded basic tier to the Sports Pak tier was made by Bickham, and approved by Rutledge.¹⁶⁵ In July 2010, Bickham had previously considered but decided against dropping or retiering GSN on the Silver tier when it had been pointed out to him that GSN ranked 49th out of 52 networks on the expanded basic tier and that GSN subscribers were loyal viewers¹⁶⁶—a subscriber attribute that was highly valued by Cablevision.¹⁶⁷ Also, in July 2010, of the seven affiliated networks Cablevision distributed on the expanded basic tier, GSN outranked MSG, Cablevision’s affiliated sports network.¹⁶⁸ When the retiering decision was made in November 2010, GSN ranked 45th out of 56 networks on the expanded basic tier, and outranked MSG, MSG Plus and MSG Varsity, the three affiliated sports networks that Cablevision

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“{{[REDACTED]}}” of a carriage agreement with {{[REDACTED]}} “{{[REDACTED]}}”.

¹⁶² CV Exh. 141 at 3. *See also* Tr. at 1525:9-11.

¹⁶³ CV Exh. 141 at 3.

¹⁶⁴ *Ibid.* Cablevision informed GSN of the retiering decision on Friday, December 3, instead of on Monday, December 6, 2010, as planned. *See* CV Exh. 146 (12/3/10 email in which Montemagno stated that he had “informed GSN of our intentions” and GSN was “likely going to call me on Monday” once the retiering decision has “been socialized there.”).

¹⁶⁵ CV Exh. 121E (12/6/10 memorandum to Bickham from Budill in which Budill reports that “[p]ursuant to a meeting with COO [Rutledge] and President [Bickham], CSC intends to reposition GSN to Sports Pak in early 2011”). *See* Tr. at 1558:18-24 (Montemagno testified that the “ultimate decision” to retier GSN to the premium sports tier was not made by him but was made by Bickham). *Cf.* Sapan Testimony at 211 (Sapan testified that “Tom Rutledge’s job ultimately [was] overseeing John Bickham overseeing Mac Budill overseeing Tom Montemagno”). *See also* Bickham Testimony at 69-70 (Bickham identified Rutledge as the final decisionmaker but also testified that he and Rutledge were the only two people who were involved in making the final decision to move GSN to the premium sports tier); Dolan Testimony at 76 (Dolan testified that the decision to retier GSN “would have been made by Mr. Budill, Mr. Bickham and Mr. Rutledge” and that he played no role in making the decision). *Cf.* Bickham Testimony at 61 (Bickham testified that he did not know whether he had shared the July 2010 GSN carriage assessment with Rutledge but he was emphatic that he would not have shared such information with Dolan).

¹⁶⁶ *See supra* para. 29.

¹⁶⁷ *See* Dolan Testimony at 112-14 (Dolan testified that it is more valuable to Cablevision to have fewer subscribers watching a network frequently than it is to have many subscribers watching a network infrequently); *id.* at 114 (Dolan also testified that the number of times subscribers return to a network “means they’ve gone to the program, they see the programming, they like the program, they go back and watch it again”); *id.* at 115 (Dolan further testified that by repeatedly returning to a network, the subscribers “are clearly saying to saying to you [the cable distributor] that, . . . they enjoy the programming.”). *Cf.* Brooks Expert Testimony at 43 (Brooks testified that “[l]oyalty is a proxy for satisfied customers. It is often why subscribers subscribe in the first place—to be able to watch the channels they passionately like.”). *See also ibid.* (Brooks’s expert analysis found that “GSN households are certainly loyal, spending more than twice as many hours tuning to GSN as WE tv households spent tuning to WE tv during the sample week provided by Cablevision.”).

¹⁶⁸ MSG was ranked 50th out of the 52 networks Cablevision distributed as the expanded basic tier in July 2010. CV Exh. 117 at 7.

distributed on the expanded basic tier.¹⁶⁹ There is no evidence that Cablevision gave any consideration to retiering any affiliated sports networks to the Sports Pak tier.

38. In contrast to the cost-savings proposal Rutledge had made at the November 8, 2010 budget meeting, Bickham decided to move only GSN, which he knew to be a general entertainment network, to a Sports Pak tier that Bickham described as “a collection of sports programming, pure sports programming” with “one or more networks that were outdoor related – hunting, fishing, that type of thing,” and Bickham believed that the networks Cablevision distributed on the premium sports tier tended to attract “male” viewers.¹⁷⁰ In targeting GSN, Bickham apparently gave no consideration to whether GSN’s programming tended to attract male or female viewers.¹⁷¹ Bickham also testified that he gave no consideration to how broadly other MVPDs distributed GSN.¹⁷² Nor apparently did Bickham consider how GSN’s retiering would impact Cablevision’s affiliated networks in general, or WE tv and Wedding Central in particular.¹⁷³

39. GSN’s availability to retier derived from the assessment made in July 2010 as being a non-affiliated network that was out-of-contract.¹⁷⁴ In making the decision in November 2010 to move GSN from the expanded basic tier to the Sports Pak tier, Bickham “considered [1] the fact that [GSN’s programming] was old reruns that appealed to a niche audience, [2] the fact that it was not must-have television, and [3] that [Cablevision] could essentially reduce the carriage [reach] of [GSN] without having a negative impact on the business.”¹⁷⁵ Bickham testified that moving GSN to the premium sports tier was better than dropping GSN (as he had proposed that Cablevision do in July 2010) because retiering GSN “saved almost the entire amount of carriage fees” being paid to GSN without “completely

¹⁶⁹ See CV Exh. 154 at 5 (out of 56 networks on the expanded basic tier, based on STB data, GSN ranked 45th, SoapNet ranked 46th, MSG ranked 47th, MSG Plus ranked 48th, Speed ranked 49th, MSG Varsity ranked 50th, HD Theater ranked 51st, Universal HD ranked 52nd, Eternal Word Television Network ranked 53rd, Galavision ranked 54th, Daystar ranked 55th, and Telecare ranked 56th); see also Tr. at 1655:2-20 (Montemagno testified that the information that Cablevision examined in November 2010 in connection with the retiering decision showed that of the 56 networks distributed on the expanded basic tier, GSN ranked 45th based on set-top box data and 41st based on Nielsen data).

¹⁷⁰ Bickham Testimony at 68-69.

¹⁷¹ See *id.* at 57.

¹⁷² *Id.* at 73.

¹⁷³ Bickham Testimony at 204-06; see also Montemagno Testimony at 34 (Montemagno testified that “decisions concerning carriage agreements with programming networks are made by Cablevision’s” programming side, and “[d]ecisions about network development, on the other hand, were made by . . . Rainbow”); *ibid.* (Montemagno further testified that “Cablevision’s decision to remove GSN from the expanded basic tier following its distribution team’s evaluation of programming cost-savings opportunities had absolutely nothing to [do] with a decision reached by the independently operating Rainbow . . .”).

¹⁷⁴ See Bickham Testimony at 38 (Bickham testified that because “there was no contract,” GSN was a “fairly easy network to look at”).

¹⁷⁵ *Id.* at 73. Bickham testified that a niche audience is “a small audience,” and in GSN’s case, he “assumed it was old.” *Id.* at 73-74. Bickham also testified that must-have television is “the kind of programming that if you lose it, people will call and disconnect because you don’t have it. It’s no more complicated than that.” *Id.* at 75. In addition, Bickham testified that at the time he made the decision to retier GSN in November 2010, he was not aware that GSN aired original programming. *Id.* at 107-08. The Presiding Judge notes, however, that the record unequivocally shows that the undisputed fact of GSN’s original programming was brought to Bickham’s attention no later than July 2010. See CV Exh. 119 at 3 (7/22/10 memorandum to Bickham from Montemagno that states that GSN’s “[k]ey [p]rogramming” includes “original game shows”); see also Bickham Testimony at 49-61 (Bickham testified regarding the contents of CV Exh. 119).

tak[ing] the programming away” from Cablevision subscribers.¹⁷⁶ Thus, Bickham decided to move GSN to the Sports Pak tier because, in his words, “[i]f someone had to have the Game Show Network, they could subscribe to that tier of service and see the network.”¹⁷⁷ This appears to be a recognition by Bickham of the fact that demand for GSN was so great and GSN subscribers so loyal that they would pay more without complaining to keep the programming. It also left a trove of viewers for WE tv to solicit. Here Bickham saw GSN as the unaffiliated target opportunity to make and save money without having any concern for viewers’ recourse.¹⁷⁸

e. The Retiering’s Erroneous Justification

40. On December 3, 2010, Montemagno notified Gillespie of the decision to move GSN from the expanded basic tier to the Sports Pak tier, effective February 1, 2011.¹⁷⁹ Montemagno also advised Gillespie that GSN’s “fees and ratings performance” led to the retiering decision,¹⁸⁰ and Montemagno told Gillespie that the retiering decision was “final.”¹⁸¹ Gillespie still persevered by asking Montemagno “if [Cablevision] had a price” for reversing the decision and continuing GSN’s carriage on the expanded basic tier.¹⁸² Montemagno’s response was “not really.”¹⁸³ In addition, Montemagno advised Gillespie

¹⁷⁶ *Id.* at 70. See also Montemagno Testimony at 23 (Montemagno testified that retiering GSN on the Sports Pak tier allowed Cablevision to realize nearly all of the amount Cablevision would have saved by dropping GSN in July 2010 as Bickham had sought); Tr. at 1658:22-25 (Montemagno testified that Cablevision moved GSN to the Sports Pak tier because “[i]t was the only tier that we had with low penetration that would enable [Cablevision] to save the majority of the {{[REDACTED]}} we set out to save.”).

¹⁷⁷ Bickham Testimony at 70. Dolan testified that he was told that the retiering decision was made because “GSN wanted a significant rate increase.” Dolan Testimony at 177. Dolan further testified that Cablevision’s distribution “group found that the product . . . didn’t warrant the rate increase” but “the fact that they were willing to put [GSN] on a tier” informed Dolan “that they thought there was some level of . . . customer interest in the channel but not enough to warrant . . . the carriage that GSN was looking for.” *Ibid.*

¹⁷⁸ Regardless of tier, it cost Cablevision {{[REDACTED]}} per subscriber to distribute GSN programming. By retiering GSN to the Sports Pak tier, Cablevision reduces its monthly licensing fees for GSN programming from {{[REDACTED]}} to approximately {{[REDACTED]}} (see CV Exh. 119 at 3 and CV Exh. 147), and also gains an additional \$6.95 monthly fee from each GSN viewer who then must subscribe to the Sports Pak tier for continued access to GSN programming.

¹⁷⁹ Tr. at 1524:5-10; CV Exh. 146 at 1; Montemagno Testimony at 24 (Montemagno testified that on “December 3, 2010, I called Dennis Gillespie, GSN’s senior distribution executive, to inform him of [Cablevision’s] decision to reposition GSN.”). See also GSN Exh. 93 at 1; GSN Exh. 99.

¹⁸⁰ GSN Exh. 93 at 1.

¹⁸¹ Montemagno Testimony at 24-25 (Montemagno testified that Gillespie “asked me to reconsider our decision, saying that GSN had new ideas for reinvigorating its image, but I told him the decision was final.”); CV Exh. 150 (12/04/10 email from Budill to Rutledge in which Budill reported that Montemagno “called Dennis Gillespie late yesterday to inform him of” the retiering decision, and Gillespie had “asked if there was anything [GSN] could do . . . we told him that this was about cost reduction in the face of other troubling trends in the business and . . . no . . . there wasn’t really anything they can do” (ellipses in original)); Tr. at 217:17-24 (Goldhill testified that Cablevision “explicitly said [the retiering decision] was non-negotiable”); GSN Exh. 99 (12/3/10 email from Goldhill to DIRECTV and Sony executives in which he reported that “Cablevision just informed us they will be dropping GSN to a poorly-distributed tier on February 1 . . . and that they have no interest in negotiating.”). See also GSN Exh. 127 (2/5/11 internal Cablevision emails in which Montemagno stated that although Dolan, Rutledge, and he were scheduled to meet with GSN and {{[REDACTED]}}, Montemagno was “hoping no reversal” of the retiering decision was “in the cards,” and also stated that he was confident that Rutledge “would hold firm for sure” against reversal of the retiering decision); Dolan Testimony at 173-80 (Dolan testified that he was willing to engage with GSN and {{[REDACTED]}} in an effort to find a mutually satisfactory resolution of the retiering decision “but not at the expense of undermining Mr. Rutledge” because the retiering decision was Rutledge’s call and even if Dolan “thought Mr. Rutledge’s thinking wasn’t exactly my thinking, I would support him . . .”).

¹⁸² CV Exh. 146 at 1.

that Cablevision was “looking to save hard [dollars],” and he also noted that he was “not even sure if free [carriage of GSN] would change our minds.”¹⁸⁴

41. Following Montemagno’s advice to Gillespie, Goldhill informed GSN’s management committee of Cablevision’s definitive retiering decision, which came to GSN “without warning,”¹⁸⁵ and which would “[i]mmediately”¹⁸⁶ “result[] in the loss of almost all of [GSN’s] { [REDACTED] } [Cablevision] subscribers,” as well as annual losses of “{ [REDACTED] }” in license fee revenue and “{ [REDACTED] }” in advertising revenue.¹⁸⁷ Goldhill solicited assistance from GSN’s management committee, which included DIRECTV and { [REDACTED] }, to convince Cablevision to reverse its “non-negotiable” retiering decision.¹⁸⁸ In an effort to maintain carriage of GSN on the expanded basic tier, DIRECTV’s Derek Chang made contact with Rutledge,¹⁸⁹ and { [REDACTED] } contacted Dolan.¹⁹⁰ Neither effort was successful.¹⁹¹

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¹⁸³ *Ibid.*

¹⁸⁴ *Ibid.* Montemagno also noted that during the call, Gillespie “totally got the connection to the retrans dynamic/trend and how it is going to drive more decisions like this” and that Montemagno had “made headway with that argument.” *Ibid.* But see Gillespie Testimony at 62, 124, 151 (Gillespie testified that even though he believed Montemagno to be “a good . . . stand-up guy,” Cablevision’s retiering decision “made [no] sense” to him; Gillespie also testified that Montemagno had told him that the retiering decision was based on Cablevision’s determination that, in view of GSN’s “ratings and our license fees,” “the cost was too much for the service”; and Gillespie further testified that GSN’s “ratings were probably at or above several networks that [Cablevision] carried either on a family package or on their digital package”). See also CV Exh. 150 (12/4/10 internal Cablevision email in which Budill reported to Rutledge (carbon-copying Bickham and Montemagno) that Montemagno had “called Dennis Gillespie late yesterday to inform him of” Cablevision’s decision to retier GSN to the premium sports tier; Gillespie had “asked if there was anything [GSN] could do” to change the retiering decision; and Cablevision had responded that the retiering decision “was about cost reduction in the face of other troubling trends in the business and . . . no . . . there wasn’t really anything they can do”) (ellipses in original).

¹⁸⁵ Tr. at 218:10-24. See also CV Exh. 146 (when Montemagno notified Gillespie of the retiering decision, Gillespie was “[o]bviously very disappointed and would have liked more notice”); Gillespie Testimony at 146-47 (Gillespie testified that although the possibility that Cablevision could drop GSN because GSN was out-of-contract occasionally had come up in GSN management meetings and discussions with Goldhill, Gillespie was “shocked” by the retiering decision because it “was an extraordinary step”); Tr. at 217:17-19 (Goldhill testified that he had “never heard of another established cable network being dropped or retiered, except at the end of a fairly long and often disputatious negotiation.”). Compare Martin Testimony at 197, 201 (Martin testified that “[e]very distributor expresses concern about price about every network” and “[a]s a course of business, distributors threaten drops all the time”).

¹⁸⁶ Tr. at 219:4-8.

¹⁸⁷ See GSN Exh. 99. Dolan testified that license fee revenue and advertising revenue are “the major revenue sources” for a cable network, and that such revenue is significantly impacted by how broadly the network is distributed on a cable system. Dolan Testimony at 58, 59-60.

¹⁸⁸ Tr. at 217:22-24, 220:2-12 (Goldhill testified that even though Cablevision had “explicitly said it was non-negotiable,” the notification to the management committee of the retiering decision “led to . . . , can any of you talk to anyone there [at Cablevision] and find out why this happened”); see also GSN Exh. 99.

¹⁸⁹ Chang Testimony at 108-09. See also Tr. at 1630:11-15 (Montemagno testified that after he notified GSN in December 2010 of the retiering decision, he “was made aware” that Chang had contacted Cablevision to discuss what could be done about that decision).

¹⁹⁰ Dolan Testimony at 76; *id.* at 166 (Dolan testified that “Mr. { [REDACTED] } called me . . . [and] [w]e discussed the Game Show Network and if there was a way for the company to change its position.”); see also *id.* at 79-80 (Dolan also testified that the retiering decision “was not my decision” but “was Mr. Rutledge’s decision, Mr. Bickham’s decision and Mr. Budill’s decision” and that he was not “aware of it at all until . . . I heard from { [REDACTED] }”). Although Dolan had no involvement in Cablevision’s decision to retier GSN, Dolan testified

(continued....)

42. After GSN received the December 3, 2010 retiering decision, Cablevision, through Rainbow,¹⁹² proposed reversing the retiering decision in exchange for DIRECTV's launch of Cablevision's affiliated network Wedding Central.¹⁹³ After considering Cablevision's proposal, on January 31, 2011, DIRECTV rejected it.¹⁹⁴ On the next day, Cablevision began distributing GSN on the Sports Pak, its premium sports tier.¹⁹⁵

43. GSN and {█} then proposed that, in exchange for restoring GSN's carriage on the expanded basic tier, "{█}." ¹⁹⁶ Under that proposal, Cablevision would pay a license fee of {█} to GSN {█}

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that he told {█} that he "would see what I could do . . . and find . . . maybe some more creative ways for the companies to relate to each other so that . . . they could both be satisfied." *Id.* at 168; *see also id.* at 174 (Dolan also testified that he "told Mr. {█} when I first spoke to him, these are not discussions that I would normally get involved in").

¹⁹¹ *See* GSN Exh. 102 (12/17/10 email from Goldhill to Chang in which Goldhill stated that {█} "spoke with jimmy dolan and apparently cablevision has an ask for {█})," and 12/20/10 email in which Chang replied that Cablevision "asked [DIRECTV] for something also").

¹⁹² GSN Exh. 99 (when Chang reached out to Rutledge, he was referred to Sapan, who had "some Rainbow ideas" for reversing the retiering decision); Chang Testimony at 119 (Chang testified that Rutledge told him to "[t]alk to Josh [Sapan], which I then did."). *See also* Broussard Testimony at 8 (Broussard testified that "Mr. Sapan told me that Derek Chang . . . had reached out to Mr. Rutledge in connection with the decision by Cablevision to re-tier GSN. Mr. Sapan told me that Mr. Chang asked Cablevision if there was any deal that could be done between the companies that would change Cablevision's decision to re-position GSN. Mr. Sapan further told me that Mr. Rutledge had directed Mr. Chang to contact us at Rainbow to discuss possibilities.").

¹⁹³ Chang Testimony at 130 (regarding DIRECTV's effort to persuade Cablevision to reverse the retiering decision, Chang testified that "by the end, . . . whether it was with Mr. Sapan or Mr. Broussard, . . . the only thing that was of interest from a Rainbow standpoint was for [DIRECTV] to do some sort of launch of Wedding Central"). *See also* Tr. at 1949:4-10 (Broussard testified that DIRECTV's agreement to launch Wedding Central "might have cast a favorable light on discussions that Cablevision was having with Game Show Network.").

¹⁹⁴ The Presiding Judge found conflicting evidence in the record showing that GSN-DIRECTV made the Wedding Central carriage proposal to Cablevision in an effort to persuade Cablevision to reverse its retiering decision. *See* Martin Testimony at 80, 114-16 (Martin testified that Broussard told her that Chang had called Rutledge and proposed distribution of Wedding Central by DIRECTV); Sapan Testimony at 234 (Sapan testified that he had no recollection whether he or Chang was the first to propose DIRECTV's launch of Wedding Central as the quid pro quo for reversing the GSN retiering decision). Based on the greater weight of evidence, the Presiding Judge finds that Cablevision-Rainbow made the Wedding Central carriage proposal to GSN-DIRECTV. *See* Chang Testimony at 119 (Chang testified that "at some point Josh [Sapan] – or Josh and Bob [Broussard] brought up Wedding Central as kind of the key to it all"); *id.* at 129 (Chang also testified that Sapan was the first to propose "deals around Wedding Central in exchange for putting GSN back up to where it had been"); GSN Exh. 98 (12/10/10 email in which Montemagno informed Budill that Rutledge had "tasked Broussard to come up with a list of asks for Direct TV that would be worth our keeping GSN status quo"); GSN Exh. 101 (12/18/10 email in which Broussard informed Carroll and Sapan that he "spoke with Derek [Chang] and made the proposal we discussed," and in response, Chang "said W[edding] C[entral] would be difficult but agreed to consider over the weekend"); Broussard Testimony at 8 (Broussard testified that "there were numerous business issues being discussed between DIRECTV and Rainbow, including securing carriage of Wedding Central on DIRECTV"); GSN Exh. 111 (Bickham advised that Sapan had said that "he wants to get D[IREC]TV to carry Weddings"). However, as discussed *infra* paragraph 109, while of interest, this fact is not material to a resolution of this case.

¹⁹⁵ Chang Testimony at 130 (Chang testified that "we finally decided from a DirecTV standpoint that" launching Wedding Central in exchange for maintaining Cablevision's carriage of GSN on the expanded basic tier "wasn't a trade we were willing to make, so as a result, we said no ultimately, and they did what they did.").

¹⁹⁶ Tr. at 1530:1-13.

██████████ }},¹⁹⁷ which was { {██████████} } than the { {██████████} } license rate Cablevision was paying to GSN, and was { {██████████} } of the license fee GSN sought in { {██████████} }, when the parties tabled negotiations for a new carriage agreement.¹⁹⁸ The GSN- { {██████████} } proposal would have saved Cablevision { {██████████} } annually.¹⁹⁹

44. By the time the GSN- { {██████████} } proposal was made, Cablevision was already distributing GSN on the premium sports tier,²⁰⁰ and, as Montemagno testified, Cablevision had “already put in our [2011 programming budget] plan that we were saving { {██████████} }.”²⁰¹ Consequently, “[a]ny added expense” in restoring GSN’s broad carriage “would have been added expense” that Cablevision “didn’t budget” or “plan for.”²⁰² Cablevision rejected the GSN- { {██████████} } proposal,²⁰³ and emphatically told GSN “that it would not accept any carriage proposal that required Cablevision to pay anything at all for GSN.”²⁰⁴ Montemagno similarly testified that Cablevision made a counterproposal that “the license fee { {██████████} }
██████████ }.”²⁰⁵ GSN rejected Cablevision’s counterproposal out of hand as a “non-starter.”²⁰⁶ GSN “did not view” the counterproposal “as an indication of a willingness to negotiate”²⁰⁷ or as having been made in

¹⁹⁷ *Ibid.* (GSN and { {██████████} } “{ {██████████} }
██████████ }.”
██████████ }

¹⁹⁸ See CV Exh. 40 at 1 (GSN informed Cablevision that it needed “to get to” a license fee of { {██████████} }). This license fee was equal to the license fee Cablevision paid to WE tv at the time of GSN’s retiering. See CV Exh. 136 at 12 (Cablevision paid WE tv a license fee of { {██████████} } for 2010). See also Tr. at 1644:20-1646:12 (Montemagno testified that Cablevision and WE tv entered into a new carriage agreement in March 2011 which provided a license fee of { {██████████} } for 2011 and { {██████████} } for 2012).

¹⁹⁹ Bickham Testimony at 134.

²⁰⁰ Tr. at 1531:21-1532:3 (Montemagno testified that Cablevision “already had made the change, and we didn’t want to reverse it, put the customer through that change, [and] have the public perception out there when we were having these public disputes.”).

²⁰¹ Tr. at 1532:4-5.

²⁰² *Id.* at 1532:5-6.

²⁰³ *Id.* at 1530:21-23.

²⁰⁴ Goldhill Testimony at 10. In response to the GSN- { {██████████} } proposal for restoring distribution of GSN on the expanded basic tier, Montemagno testified that he “told GSN . . . that [Cablevision] had made the change, and we weren’t interested in changing it unless [GSN] was a free – it was directionally a free service.” Tr. at 1530:21-23. Montemagno also testified that he used the terms { {██████████} } to mean that Cablevision was looking for a license rate from GSN that was “{ {██████████} }.” Tr. at 1678:4-8.

²⁰⁵ *Id.* at 1531:1-3.

²⁰⁶ Goldhill Testimony at 10 (Goldhill testified that Cablevision’s “position remained a non-starter in part, as Mr. Montemagno would have understood, { {██████████} }”); see also Tr. at 544:9-10 (Goldhill also testified that GSN viewed Cablevision’s counterproposal “as a non-proposal, since no cable network in our industry could ever accept such a proposal.”). Goldhill further testified that if GSN were to accept Cablevision’s counterproposal—i.e., “{ {██████████} }” because “{ {██████████} } then GSN “{ {██████████} }” because “{ {██████████} }.” *Id.* at 544:2-8. Compare Dolan Testimony at 70 (Dolan testified that networks with MFNs tell distributors “that we can’t give you the rate you want because then we’d have to lower everybody else’s rate.”).

²⁰⁷ Tr. at 544:9-11. Goldhill testified that Cablevision’s counterproposal was not a logical outgrowth of the GSN- { {██████████} } proposal, which “{ {██████████} },”

(continued....)

good faith.²⁰⁸

f. Effects of the Retiering Decision on Cablevision

(i) Subscriber Outrage

45. On February 1, 2011, the effective date of GSN's retiering, Cablevision was deluged with more than 11,000 calls from subscribers expressing outrage that Cablevision chose to distribute GSN on the Sports Pak tier.²⁰⁹ By the next day, Cablevision had received a total of nearly 20,000 of such calls.²¹⁰ Montemagno had anticipated that Cablevision would receive many (but not that many) complaint calls because he thought that GSN had an "older audience with higher propensity to call and complain."²¹¹ He then testified that he "was surprised at the level" of complaints which "came in higher than I expected."²¹² The unprecedented volume of calls received complaining of GSN's retiering was nearly three times greater than Cablevision's "highest amount of calls coded . . . in one day."²¹³ In contrast to GSN's retiering, the highest number of complaint calls received in a single day by Cablevision occurred "in late 2010 . . . after F[OX] pulled its programming causing Cablevision customers to miss multiple new episodes of FOX network programming, several weeks of the NFL season, the entire National League [Baseball] Championship Series, and two games of the [Major League Baseball] World Series."²¹⁴ In comparison to the FOX fiasco where the volume of complaint calls "was pretty flat," the historically high volume of GSN complaint calls precipitously declined.²¹⁵ Within 10 days of the retiering, the daily

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because the counterproposal would have resulted in GSN "{ [REDACTED] }," and so accepting it "would have essentially put [GSN] out of business." Tr. at 544:22-545:2. *But see* Tr. at 1634:10-18, 1636:1-13 (Montemagno testified that because "{ [REDACTED] }," he did not believe that Cablevision's counterproposal "would cause an impact" on GSN's MFNs with other distributors).

²⁰⁸ See Tr. at 545:10-14 (Goldhill testified that Cablevision's counterproposal was "a non-proposal proposal, because there is no cable network that can stay in business, without exception" if such a proposal were accepted). *See also* Complaint at 44 (Declaration of David Goldhill, para. 19); GSN Exh. 111 (Bickham informed Rutledge that Cablevision received "a letter last night [January 31, 2011] from the [GSN] GC . . . which was to make the claim that we have refused for { [REDACTED] } to respond to their written carriage proposals . . . and a more recent refusal to meet and engage in 'good faith negotiations' to extend the agreement").

²⁰⁹ GSN Exh. 116 (2/2/11 Cablevision email regarding "GSN Call Volume" that reported that "[y]esterday we coded 11,362 calls received regarding the Game Show Network").

²¹⁰ See GSN Exh. 127 (2/5/11 internal Cablevision email to Montemagno which declared that "[a]lmost 20[000] calls over two days is a lot of outrage"). For Cablevision, a high level of complaint calls from subscribers would be 10,000 or more in single day, while a low level of complaints would be 1,000 in a single day. *See* Dolan Testimony at 128.

²¹¹ GSN Exh. 118.

²¹² Tr. at 1622:2-13.

²¹³ GSN Exh. 116 (2/2/11 forwarded email to Bickham that stated "[t]o put this call volume in perspective, during the programming dispute with FOX the highest amount of calls coded related to that dispute in one day was 4,368").

²¹⁴ Montemagno Testimony at 11; *see* Tr. at 1623:4-1624:21; GSN Exh. 118 (2/2/11 email which stated that "G[SN] caused more calls in a single day than fox did"). Montemagno also testified that Cablevision "very aggressively" notified its subscribers of the Fox dispute which was "specifically intended to suppress people from calling us" because if Cablevision had not done so, "we would have gotten a lot more phone calls and questions[] [a]nd it costs us money to take . . . all those calls." Tr. at 1625:4-20. In contrast, Cablevision did not take such measures with respect to notifying subscribers of GSN's retiering because Cablevision "didn't want the issue to be highly visible to customers that were not aware of the change." GSN Exh. 116.

²¹⁵ See GSN Exh. 129 (as of February 7, 2011—the sixth day of GSN's retiering—Cablevision had "received 24,865 calls in reference to the tier change").

volume of calls had dropped to 655 calls.²¹⁶ But by then, Cablevision had received a total of 27,367 calls complaining of GSN's retiering to the premium sports tier.²¹⁷

(ii) Fallout of the Retiering Decision

46. In addition to complaint telephone calls, Cablevision received email messages expressing anger,²¹⁸ outrage,²¹⁹ and fury²²⁰ that GSN had been moved from the expanded basic tier to the premium sports tier. Some emails accused Cablevision of "gouging"²²¹ its subscribers by requiring them to pay an additional \$6.95 for GSN when they had "already paid for it in [their] current package."²²² A Cablevision subscriber pointed out that some GSN viewers are elderly,²²³ and another complained that, in moving GSN from expanded basic to the Sports Pak tier, Cablevision was "really just trying to get more money from a sector of your customers who can't afford it."²²⁴ And subscribers of all demographics²²⁵ universally complained that it made no sense for Cablevision to include GSN in a sports package. One such Cablevision subscriber complained that "[m]ost people who watch GSN could care less about a sports package."²²⁶ Another observed that "GSN and Sports have no connection."²²⁷ Without any doubt,

²¹⁶ GSN Exh. 132.

²¹⁷ *Ibid.* See also Tr. at 1626:17 (Montemagno testified that the complaint calls regarding GSN's retiering "only lasted about a week").

²¹⁸ GSN Exh. 113 (2/1/11 email to Dolan from a Cablevision expanded basic tier subscriber who was "really angry" that Cablevision "put the GSN into the Sports Package").

²¹⁹ GSN Exh. 117 (2/2/11 email to Charles Schueler*, Bickham, and Dolan from "AN EXTREMELY DISSATISFIED CUSTOMER!" who stated that she was "TOTALLY shocked and OUTRAGED with Cablevision taking GSN away and adding it to an IO Sports package") (capitalization in original). [*Schueler is identified in the record as the head of public relations for Cablevision. See Bickham Testimony at 124.]

²²⁰ GSN Exh. 115 (2/2/11 email to Schueler, Bickham, and Dolan from a Cablevision expanded basic tier subscriber who said that she was "furious that the Game Show Network [was] taken off and put with the sports package!").

²²¹ GSN Exh. 126 (2/4/11 email to Dolan from Cablevision subscriber who questioned "[w]hy do I now have to pay for the Game Show Network" and "[i]sn't your company profitable enough without gouging customers?"). See also GSN 117 (Cablevision accused of taking away GSN, "a popular channel, that we already paid for," solely for the purpose of requiring GSN's viewers to "pay extra . . . just to get GSN back"). Compare Bickham Testimony at 70 (Bickham testified that he "fundamentally" made the decision to move GSN to the premium sports tier because "[i]f someone had to have the Game Show Network, they could subscribe to that tier of service and see the network.").

²²² GSN Exh. 117; see *ibid.* ("It's all about money for Cablevision. You must see how many people watch GSN and figure make a new stupid package, throw the GSN into it (even though it has nothing to do with SPORTS) and make another \$6.95 a month."); GSN Exh. 119 (2/3/11 email to Dolan from Cablevision subscriber who complained that it was "horrible" that Cablevision was "looking to collect more money from your customers for channels which were originally included in your basic family package.").

²²³ GSN Exh. 113; see also GSN Exh. 115 ("I am a 76-year-old widow and I really enjoyed the game show network. My other elderly bingo friends also enjoyed it and we often discussed the shows when we get together. There's not too much for the older person to do for entertainment and now [Cablevision] took away the one thing we enjoyed."). Compare Montemagno Testimony at 27 (Montemagno testified that it was his understanding that "retirees . . . make up a significant portion of GSN viewers"); GSN Exh. 118 (2/2/11 email in which Montemagno stated that GSN has an "older audience").

²²⁴ GSN Exh. 113.

²²⁵ Demographics, or demos, refers to the "component parts of a network's audience, based on various characteristics such as age, gender, income, or education level." Joint Glossary at 2.

²²⁶ GSN Exh. 126; see GSN Exh. 117 ("[W]hat could possibl[y] be the connection between a game show network and this sports package? Except NOTHING!") (capitalization in original); *ibid.* ("I LOVE the GSN and am an avid watcher. I HATE sports! Hate them! I will not pay \$6.95 just to get GSN back because I already paid for it in my current package. I have NO use for any sports channels and surely none of those.") (capitalization in original); GSN

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it was the cold economics of the retier favoring Cablevision, with no consideration of the gender or preference of subscribers or the genre of programming, that drove Cablevision's retiering decision.

47. Bickham was so affected by the subscriber outrage that he authorized a six-month subscription to the premium sports tier free of charge to "any sub[scriber] that calls and complains or threatens to disconnect from this point [February 4, 2011] forward."²²⁸ But Bickham was "not comfortable" extending the subsidy to the "19,000 customers that have already called" to complain of GSN's retiering.²²⁹ He then said that he would give further consideration to doing so.²³⁰ Later, Bickham said that "he was open to the idea if it was not found to be too difficult to do."²³¹ Cablevision personnel "found i[t] was not to[o] difficult" to extend the subsidy to the "20k or so" Cablevision subscribers who had "already called in to complain."²³² So the promotion was authorized for all complaining GSN subscribers.²³³ Reliable and substantial evidence shows that Cablevision provided the retier promotion to approximately 24,000 subscribers overall.²³⁴

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113 (the "elderly people" who watch GSN "have no interests in Sports"); GSN Exh. 115 ("I certainly have no interest in sports . . . nor do my female friends."); *ibid.* ("I don't understand the reason [Cablevision] would put game show network with sports package" because "[t]hey have nothing to do with each other"); GSN Exh. 119 ("Removing GSN from you[r] family package" is an example of how Cablevision "consistently robs" its subscribers, "[a]nd to include it in your sports package [t]he moron who thought that [GSN] belongs in the sports package should be fired!") (ellipsis in original).

²²⁷ GSN Exh. 117; *see also* Tr. at 1612:19 (Montemagno testified that "GSN is not sports."); *id.* at 1658:19-25 (Montemagno further testified that GSN was not moved to the Sports Pak tier because it was a sports network but because the premium sports tier "was the only tier that we had with low penetration that would enable us to save the majority of the [\$]{{█}} we set out to save."); *id.* at 1659:3-5 (in contrast, Montemagno testified that Cablevision's entertainment tier with the lowest penetration—i.e., the Gold tier—was "at least {{█}} percent penetrated, [and] so we wouldn't have saved most of the fees if we put [GSN] in that tier.").

²²⁸ GSN Exh. 124. *See also* CV Exh. 334—Direct Testimony of Jonathan Orszag (Orszag Expert Testimony) at 163 n.278 (Cablevision's expert witness testified that "[f]ree upgrades and other promotions are part of the arsenal of tools that MVPDs employ in persuading subscribers not to switch to other MVPDs.").

²²⁹ GSN Exh. 124.

²³⁰ *Ibid.*

²³¹ GSN Exh. 125.

²³² *Ibid.*

²³³ *Ibid.*

²³⁴ CV Exh. 316 (showing that the premium sports tier gained {{█}} subscribers in February 2011); Orszag Expert Testimony at 125 (analysis of STB data showed that "GSN's retiering added about {{█}} S[ports] & E[ntertainment] tier subscribers"); Tr. at 2570:12-14 (Orszag testified that {{█}} Cablevision subscribers also subscribed to the premium sports tier "directly because GSN was now available on the sports tier"). The Presiding Judge notes that the cited record evidence outweighs conflicting evidence in the record—which also was not contested—that Cablevision provided the Sports Pak promotion to the approximately 7,700 subscribers who complained of GSN's retiering *after* the promotion was authorized by Bickham on February 4, 2011. *See* Tr. at 1626:14-20 (Montemagno testified that the premium sports tier promotion was only "given to a certain subset of customers," which he also testified numbered 7,700 GSN viewers); Montemagno Testimony at 27-28 (Montemagno testified that "we offered customers who called to lodge a complaint about the re-tiering between February and November 2011 a complimentary service credit for the Sports & Entertainment Pak. Of the nearly three million Cablevision subscribers that had GSN on expanded basic prior to the re-tiering, a small number—approximately 7,700 over the course of nearly a year—took advantage of the offer.")).** *See also* GSN Exh 182 (undated document that listed "7,695" as the number of "[o]riginal adds in 2011" to the premium sports tier); Singer Expert Testimony at 53 n.153 (Singer testified that "[t]o an economist, it is relevant that some 7,700 complaining customers were selected by Cablevision to receive a subsidy while roughly 19,300 were not."); Orszag Expert Testimony at 169 (Orszag testified that "[a]ccording to Cablevision data, about 7,700 . . . subscribers received the S&E Tier free

(continued....)

48. In settling this battle of the experts, it is found by the preponderance of record evidence that Cablevision initially lost approximately 2,300 subscribers as a result of GSN's retiering.²³⁵ Once the promotion expired, Cablevision lost approximately 3,200 additional subscribers, for a total of 5,500 subscribers; and approximately { [REDACTED] } of subscribers who stayed with Cablevision post-GSN's retiering, discontinued their subscription to the premium sports tier.²³⁶ The preponderance of the evidence also proves that Cablevision netted approximately { [REDACTED] } new subscribers to the premium sports tier due to GSN's retiering.²³⁷

(iii) Renaming the Tier

49. On February 4, 2011, three days after retiering GSN, Bickham changed the name of the premium sports tier from "Sports Pak" to "Sports and Entertainment Pak" because, with the addition of GSN to the tier, Bickham believed that the addition of "entertainment" "more adequately reflected the content of the tier."²³⁸ Cablevision's marketing personnel balked. They thought that justifying the renamed tier would be a "challenge" since GSN was "the only channel that does not surround sports."²³⁹ Cablevision's public relations staff urged that Cablevision "need[ed] to get some more 'entertainment'

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of charge."). [**The Presiding Judge rejects, as inconsistent with contemporaneous and credible documentary evidence (i.e., GSN Exh. 124—Bickham authorized "for the next 2 weeks" the extension of the premium sports tier promotion to "any sub[scriber] that calls and complains or threatens to disconnect") and Montemagno's own hearing testimony (i.e., Tr. at 1531:25-1532:4, 1626:17—Montemagno testified that the "the customer calls [had] stopped" by the time GSN sought reversal of the retiering decision, and that the complaint calls regarding GSN's retiering "only lasted about a week"), the portion of Montemagno's written testimony that asserts that Cablevision offered the premium sports tier promotion "over the course of nearly year" and to "customers who called . . . between February and November 2011."]

²³⁵ Singer Expert Testimony at 49 (Singer testified that "[w]ith respect to churn, the data suggest that roughly 1,000 to 2,300 customers left Cablevision due to GSN's tiering despite Cablevision's subsidy."). *But see* Orszag Expert Testimony at 168 (Orszag testified that his "own analysis finds no evidence of any subscriber losses for Cablevision from GSN's retiering."). By its own count, Cablevision lost approximately 3,200 subscribers as a result of GSN's retiering once the premium sports tier promotion ended (*see infra* note 236); the Presiding Judge does not find credible and rejects Orszag's unconvincing assertion that Cablevision suffered no immediate or post-promotion "subscriber losses" as a result of GSN's retiering.

²³⁶ Tr. at 1626:14-1627:4 (with respect to 7,700 of Cablevision subscribers who had received the premium sports tier promotion, Montemagno testified that Cablevision lost approximately 3,200 of them but 4,500 of them remained Cablevision subscribers; and, of those who remained with Cablevision, { [REDACTED] } of them became paying subscribers to the Sports Pak tier).

²³⁷ CV Exh. 316, Tr. at 1626:14-1627:4 (calculated by taking the approximately 24,000 subscribers who ultimately received the Sports Pak promotion minus the approximately 3,200 who left Cablevision altogether and the approximately { [REDACTED] } who stayed with Cablevision but discontinued their subscription to the premium sports tier once the promotion ended).

²³⁸ Bickham Testimony at 125. *See also* GSN Exh. 125 (2/4/11 Cablevision email that stated "[a]s a separate note on GSN, John B[ickham] wants the name of this tier to be changed from the Sports Tier to the Sports & Entertainment Tier. Thus it will be so."); GSN Exh. 127 (2/5/11 email in which Montemagno stated that he was told that "Bickham insisted on" renaming the tier). Bickham also testified that changing the name of the tier involved "a lot of steps, but it's not a lot of work." Bickham Testimony at 113. Bickham further testified that he did not find it necessary to change the name of the premium sports tier until GSN's inclusion on the tier, despite his conflicting testimony that he "thought the tier was broader than sports before Game Show Network was added to it." *Id.* at 118. *See also id.* at 115, 121 (Bickham testified that "[t]hat the programming on the tier was broader than sports" because, in addition to GSN, the tier included "MATV and what I would call outdoor life sort of lifestyle channels" like Outdoor Channel, which was described as featuring "quality programming designed for sportsmen of all skill levels").

²³⁹ GSN Exh. 122. *See also* Tr. at 1612:12 (Montemagno testified that "GSN is not sports").

into that thing, pronto, to validate the shift” of GSN’s programming to a sports tier.²⁴⁰ At the time of the hearing in 2015, GSN still was the only general entertainment network that Cablevision distributed on its premium sports tier.²⁴¹ By March 2012, Cablevision had expanded the Gold tier—its premium entertainment tier—by adding all networks, including GSN, that Cablevision also distributed separately as the premium sports tier.²⁴²

2. GSN Was Similarly Situated to WE tv and Wedding Central

50. The preponderance of record evidence further proves that GSN, WE tv, and the discontinued Wedding Central (when it existed) were and are similarly situated networks.²⁴³ Before the retiering that is the subject of the GSN’s program carriage complaint, Cablevision distributed all three networks on broadly penetrated tiers. In fact, Cablevision distributed GSN and WE tv on the same expanded basic tier.²⁴⁴ Also, at the time of retiering, each of these networks offered similar advertiser-supported entertainment programming that was targeted to the same adult female audience, and each of the three had an audience that was predominantly adult female. It is therefore found that for all practical purposes, GSN and WE tv are competing for the same advertisers.

a. Women’s Networks

51. The preponderance of record evidence proves that GSN, WE tv, and Wedding Central are properly described as “women’s networks.” GSN expert Brooks persuasively testified that a women’s network is “a network that appeals primarily to women.”²⁴⁵ Brooks also opined that while the overall television viewing audience skews female—meaning that 51-52 percent of television viewers as a whole are female and 48-49 percent are male²⁴⁶—networks that skew more heavily female are commonly described as “women’s networks”²⁴⁷ and those that skew more heavily male as “men’s networks.”²⁴⁸

²⁴⁰ GSN Exh. 127.

²⁴¹ Tr. at 1614:16-19 (Montemagno testified that as of July 15, 2015, GSN remained the only entertainment network that Cablevision distributed on its premium sports tier).

²⁴² CV Exh. 316 at 1 (on March 27, 2012, Cablevision launched a new “Optimum Gold” tier which “includes [the] Sports Pak”); *see also* Montemagno Testimony at 28 n.5. In August 2012, Cablevision launched the sports network NFL Redzone on the premium sports tier. CV Exh. 316 at 1.

²⁴³ The Presiding Judge finds that the “look and feel” comparative analysis conducted by Cablevision’s expert Michael Egan of GSN’s and WE tv’s website is not sufficiently reliable since at hearing Egan stated that he was “not sure” if he had conducted an apples-to-apples rather than an apples-to-oranges analysis of the two websites. *See* Tr. at 2334:2-17.

²⁴⁴ Cablevision distributed GSN and WE tv on an expanded basic tier that was accessible to {{[REDACTED]}} percent of its subscribers, and distributed Wedding Central on a digital basic tier that was accessible to {{[REDACTED]}} percent of its subscribers. *See supra* paras. 15-17, and note 80.

²⁴⁵ Tr. at 1161:20-22. *See also id.* Tr. at 1326:10-25 (Brooks testified that a network that skews 52 percent female to 48 percent male is not a women’s network but networks like GSN that skew in the range of 70 percent female to 30 percent male, are women’s networks).

²⁴⁶ *Id.* at 1326:10-11 (Brooks testified that “[o]verall television viewing is roughly 52 percent female to 48 percent [male], sometimes 51 to 49, that degree of difference.”).

²⁴⁷ *See id.* at 1161:20-22 (Brooks testified that “‘a woman’s network’ . . . mean[s] a network that appeals primarily to women”). Throughout the record, Bravo, E!, Lifetime, OWN, Oxygen, SoapNet, Style, and TLC, among other networks, are described as women’s networks. *See, e.g., id.* at 1350:18-25; Brooks Expert Testimony at 8-9.

²⁴⁸ ESPN, with an audience that skews heavily male is universally described in the record as a men’s network. *See, e.g.,* Tr. at 1229:9-10 (Brooks testified that ESPN’s audience is 75 percent male and 25 percent female); Tr. at 269:12-13 (Goldhill testified that “ESPN obviously is in the male business.”). Cable networks Spike TV and Versus are also identified as men’s networks. *See id.* at 1313:12-18; *see also* CV Exh. 816 at 1284 (noting that in 2003 the new owners of the cable network then-known as TNN announced that they were “renaming the network Spike TV,

(continued....)

Brooks testified unequivocally that a network with an audience that is 70 percent female is “[d]efinitely” a women’s network.²⁴⁹ Brooks testified that at the time of GSN’s retiering “approximately 70 percent of [GSN’s] audience was a female audience,”²⁵⁰ a fact that was not contested. Brooks similarly testified that as between female-targeted, male-targeted, and general audience-targeted networks, “GSN falls clearly within the definition of what constitutes a female-targeted network.”²⁵¹

52. At hearing, Cablevision recognized that GSN is a female-skewing network but challenged the fact that GSN is also properly described as a women’s network.²⁵² Cablevision pointed to GSN’s and WE tv’s respective listings in the Cable Directory to support its contention that GSN is not a women’s network.²⁵³ In the Cable Directory, WE tv (like Oxygen²⁵⁴) is specifically described as a women’s network.²⁵⁵ In fact, as Cablevision emphasized, WE tv is described as a women’s network twice in its Cable Directory listing.²⁵⁶ In contrast, GSN is not described specifically as a women’s network in the Cable Directory,²⁵⁷ a meaningless omission as explained in paragraph 53 below.

53. The Presiding Judge finds that a mere omission of the words “women’s network” from GSN’s listing in the Cable Directory is of no significance when the preponderance of record evidence proves that GSN—like WE tv and Wedding Central—is in fact a women’s network. Brooks, co-author of the Cable Directory, confirmed on cross-examination that the Cable Directory is an authoritative industry reference tool for “what kinds of programming and what specific programs” run on cable networks.²⁵⁸ But it is “not an encyclopedia for what skews are or what their audiences necessarily are.”²⁵⁹ Brooks also testified that he was “not uniform” in his description of women’s networks, and in fact, he did not describe such networks that way “in many . . . write ups.”²⁶⁰ For example, contrary to Cablevision’s

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and turning it into a men’s channel with testosterone-driven movies such as *Bladerunner* and *The Terminator* and male-oriented series offering raunchy humor, sexual innuendo, muscle cars and action”).

²⁴⁹ Tr. at 1326:22-25.

²⁵⁰ *Id.* at 1140:19-20; *see also* GSN 312 (at the time of retiering, GSN’s audience was 69% female, and WE tv’s audience was 78% female). Brooks also testified that, at the time of GSN’s retiering, he assumed that Wedding Central’s audience also skewed heavily female because all of Wedding Central’s programming had run previously on WE tv, and so he had “looked at what kind of audience those same programs got when they were on WE tv, and they all got very strong female audiences when they had previously run there.” Tr. at 1141:9-14. Post-retiering, GSN’s and WE tv’s audience continued to skew heavily female; in fact, post-retiering, GSN’s audience skewed slightly more heavily female while WE tv’s audience skewed less heavily female. *See* GSN 312 (by 2014, GSN’s audience was 71% female and WE tv’s audience was 70% female).

²⁵¹ Brooks Expert Testimony at 15.

²⁵² At hearing, GSN fact witness Hopkins agreed with Cablevision that all women’s networks skew female but not all female-skewing networks are women’s networks. She also testified that GSN is “both” a network that skews female and a women’s network. Tr. at 700:24-701:7.

²⁵³ There is no listing for Wedding Central in the Cable Directory.

²⁵⁴ CV Exh. 816 at 1041-42. Cablevision also noted that, in the Cable Directory, Oxygen’s programming was described as “female-appropriate” (*id.* at 1041). Tr. at 1179:5-22.

²⁵⁵ CV Exh. 816 at 1477.

²⁵⁶ Tr. at 1182:2-24.

²⁵⁷ *See* CV Exh. 816 at 515-16; Tr. at 1184:14-1188:2.

²⁵⁸ Tr. at 1185:13-16.

²⁵⁹ *Ibid.*

²⁶⁰ Tr. at 1185:13-1186:2.

assertion at hearing,²⁶¹ the Presiding Judge notes that in the Cable Directory, while Lifetime is described as the “longtime . . . leader” among women’s networks in Oxygen’s listing, Lifetime is not described as a women’s network in its own listing.²⁶² Instead, Lifetime is described as a network that “offers programming of special interest to women . . . from daytime service and game shows to sitcoms, dramas, and movies.”²⁶³ And similar to GSN’s listing, the Cable Directory listings for Bravo, E!, and SoapNet—three networks whose status as women’s networks is undisputed by the record—are not specifically described as women’s networks, nor are they described as networks offering programming of special interest to women.²⁶⁴

54. Cablevision argued that GSN is not properly described as a women’s network because, at the time of retiering, GSN aired poker programming during prime-time two nights per week, which was programming that appealed to a male audience, specifically men in the 25-54 age demographic.²⁶⁵ Goldhill distinguished this poker programming as “essentially an infomercial,”²⁶⁶ which is not traditional programming. Goldhill also pointed out that “off-shore gambling sites paid [GSN] . . . to produce [poker programming]. . . on which they, in some cases, were the exclusive advertisers.”²⁶⁷ Goldhill particularly noted that poker programming “was profitable”²⁶⁸ and was “the only original programming that [GSN had] ever made money on.”²⁶⁹ But because poker programming “was inconsistent with the brand we were trying to build,” Goldhill testified that GSN relegated it to the 9pm-to-midnight timeslot on Saturday and Sunday, which were “GSN’s weakest nights.”²⁷⁰ Goldhill explained that GSN aired “all of the new

²⁶¹ Tr. at 1181:5-6 (Cablevision incorrectly asserted that Lifetime is specifically described “as a women’s network” in the Cable Directory).

²⁶² CV Exh. 816 at 1041.

²⁶³ CV Exh. 816 at 794 (emphases added); *see also* Tr. at 1180:13-14.

²⁶⁴ *See* CV Exh. 816 at 179, 402, 1267; *see also* Tr. at 1353:19-23 (regarding the omission of “women’s network” from the Cable Directory listings for GSN, Bravo, E!, and SoapNet, Brooks testified that “[i]t was not our rule to include that information routinely in the write-ups”). The Cable Directory is similarly inconsistent in describing men’s networks. For instance, although Spike TV is described as a men’s network (*see supra* note 248), ESPN is not described as such; nor is any mention made that its programming is of special interest to men (or to any particular audience). *See* CV Exh. 816 at 405. And as pointed out during Brooks’s redirect testimony, the Cable Directory was published in 2007. Tr. at 1354:13-14. The Presiding Judge also notes that this was the same year that Goldhill joined GSN, and it was under his stewardship that GSN began experiencing “very substantial growth” in its female audience. *Id.* at 198:4-8. *Cf.* Martin Testimony at 120-28 (Martin testified that, during a presentation she made in November 2008, she stated that WE tv was then “the fastest-growing network” in female viewers “followed by Bravo . . . Oxygen . . . Lifetime Movie Network . . . Game Show Network.”); Hopkins Testimony at 1 (Hopkins testified that “in early 2009” she was hired by Goldhill “to help [GSN] market itself to its existing female viewership and to help attract new female viewers to our programming.”).

²⁶⁵ *See generally* Tr. at 262:3-277:5.

²⁶⁶ *Id.* at 262:13-14.

²⁶⁷ *Id.* at 263:5-10.

²⁶⁸ *Id.* at 274:1-4.

²⁶⁹ *Id.* at 262:21-22; *see also id.* at 663:18-22 (Hopkins similarly testified that the “economic reality” was that GSN aired poker “at a time when poker was hot” and “if poker’s not hot, it’s not airing anymore”).

²⁷⁰ *Id.* at 265:15-22. Zaccario similarly testified the GSN “always” aired poker programming on Saturday and Sunday nights, which were the “least important nights of the week for us.” *Id.* at 786:11-18. Zaccario explained that “Saturday is typically a throw away” and on “Sunday night there’s so much competition everywhere else, we sort of try to hit where they ain’t.” *Id.* at 786:17-20. For example, during the time that GSN was airing poker, Zaccario testified that because “Desperate Housewives was killing it on ABC[;] [i]t wouldn’t make sense to put our original programming targeting women up against Desperate Housewives[.] [s]o, that’s why we felt it was a safe place to put poker.” *Id.* at 786:20-24; *see also id.* at 787:2-3 (Zaccario further testified that the competition for women viewers was especially fierce on Sunday nights “[w]hich is why we put poker there.”).

original programming . . . in prime time, Monday to Friday,” and had reasoned that the “male audiences that love poker . . . would find it on whatever night we put it on, so we put it on our least competitive two nights.”²⁷¹ GSN’s head of programming similarly testified that poker programming, which was entirely paid for by advertisers, was isolated on GSN’s programming schedule “because the viewership for poker had nothing to do with the rest of the brand.”²⁷² In addition, Brooks testified that it was not remarkable that a women’s network like GSN would air a discrete block of poker programming because he had “seen other cases where networks have non-typical programming for . . . financial reasons.”²⁷³ Goldhill further testified that, no later than September 2011, GSN was only airing poker programming on its “absolute weakest night, Saturday night,” and soon after, cancelled poker programming altogether.²⁷⁴ In conclusion, Goldhill testified that at the time of retiering—which is when GSN “had the maximum amount of poker programming on the air”—GSN was “a 68 percent female network.”²⁷⁵ And “[s]o even when we had the most poker programming we had, it’s [sic] impact on our overall skew was very small.”²⁷⁶ The Presiding Judge notes that GSN’s airing of a limited amount of paid poker programming on weekend nights provides very little weight in proving GSN is anything but a women’s network. Surely the evidence of the poker “infomercial” programming is vastly outweighed by a preponderance of record evidence which establishes that GSN is deservedly described as a women’s network.

55. The record reflects that GSN and WE tv used comparable language to describe their respective network as a women’s network. For example, WE tv President Martin testified that WE tv is a women’s network because “the majority of our viewership is female, our appeal, marketing materials is female, [and] the majority of our advertisers buy female demos.”²⁷⁷ GSN executive Hopkins similarly testified that GSN is a “women’s network” because its “mission every day is to program and market to women.”²⁷⁸ GSN President Goldhill confirmed that “GSN’s target audience is women primarily 25 to 54, secondarily 18-49, and tertiarily, all ages.”²⁷⁹ In the face of this testimony, Cablevision argues that GSN—in contrast to WE tv (and presumably Wedding Central)—neither specifically targeted women nor marketed its network as such.²⁸⁰

56. The linchpin of Cablevision’s argument is the testimony of “GSN’s former distribution chief, Mr. Gillespie”²⁸¹ concerning a presentation that GSN made in 2009—two years prior to the retiering and not to Cablevision but to Comcast²⁸²—in which GSN told Comcast that “GSN is the only TV network devoted exclusively to games,”²⁸³ and advised Comcast that “[g]ame [s]hows deliver the

²⁷¹ *Id.* at 265:18-266:10.

²⁷² Goode Testimony at 33.

²⁷³ Tr. at 1349:14-15; *cf.* Tr. at 1202:7-8 (Brooks testified that although Lifetime did not air poker programming, “[i]t did [air] non-women shows on occasion”). *See also* Brooks Expert Testimony at 30 n.60 (Brooks testified that Lifetime is “the oldest of the women’s networks”).

²⁷⁴ Tr. at 277:8-25.

²⁷⁵ *Id.* at 272:8-11.

²⁷⁶ *Ibid.*

²⁷⁷ Martin Testimony at 37.

²⁷⁸ Tr. at 701:3-7; *see also* Goode Testimony at 76 (Goode testified that “everything on GSN . . . had to have what I thought was female appeal”).

²⁷⁹ Tr. at 186:24-25.

²⁸⁰ *See* Cablevision Br. at 12-13.

²⁸¹ *Id.* at 12.

²⁸² CV Exh. 50.

²⁸³ *Id.* at 2 (underlining in original); Gillespie Testimony at 72.

largest audience for broadcast networks, and offer family-friendly programming with wide audience appeal.”²⁸⁴ In the presentation, GSN emphasized its “unique position” in the “typical cable line-up by genre,” as GSN positioned itself exclusively under “games” and in between “general entertainment” which among other networks, included Bravo and TLC,²⁸⁵ and “women’s ent[ertainment],” under which GSN included only WE tv, Lifetime, Oxygen, and SoapNet.²⁸⁶

57. Cablevision’s argument rests on Gillespie’s testimony that GSN generally “marketed” the network to cable distributors “as a broad-based, family oriented service that appealed to an adult audience.”²⁸⁷ Gillespie further testified that, in his view, broad-based service “means it is a television network that appeals to all different demographics . . . [m]en and women and of all ages.”²⁸⁸ Based on this testimony, Cablevision argues that Gillespie “conceded that GSN never specifically targeted women, much less those in the key 25 to 54 demographic sought by WE tv” and “forthrightly acknowledged that GSN had no such target audience.”²⁸⁹ The Presiding Judge does not find that Gillespie made any such admission. However, the Presiding Judge does agree that when marketing its service to cable distributors, GSN “consistently emphasized its wide appeal to a broad-based, family audience.”²⁹⁰ Conversely, GSN did not market itself to cable distributors as a women’s network. GSN’s sales pitch, however, is not probative or convincing in determining whether at the time of retiering, GSN was a women’s network, or whether GSN, WE tv, and Wedding Central were or were not similarly situated networks.²⁹¹ The inducement of broad-based-family-adult programming that GSN made to cable distributors makes sense because the strongest factor that a distributor cares about is the number of “eyeballs” watching the network regardless of gender.

58. Finally, the portion of Gillespie’s “candid” testimony on which Cablevision relies in

²⁸⁴ CV Exh. 50 at 4. In addition, the presentation emphasized that “GSN is Home to the Best Game Shows Delivering a loyal Broad-based Audience.” *Ibid.*

²⁸⁵ Bravo and TLC are among the networks that are indisputably described as women’s networks in the record. *See supra* para. 53.

²⁸⁶ CV Exh. 50 at 3 (capitalization omitted); *see also* Gillespie Testimony at 73-74.

²⁸⁷ Gillespie Testimony at 72-73.

²⁸⁸ *Id.* at 73.

²⁸⁹ Cablevision Br. at 12 (citing Cablevision’s Findings and Conclusions at 60-62, 132-33, and *Game Show Network, LLC v. Cablevision Systems Corp.*, MB Docket No. 12-122, Cablevision Systems Corporation’s Reply Findings of Fact and Conclusions of Law (filed Sept. 30, 2015) at 18-19).

²⁹⁰ *Id.* at 12; *see also* Gillespie Testimony at 74-75 (Gillespie testified that GSN consistently “made presentations that the programming on GSN appealed to women” but GSN did not specifically market the network to cable distributors as a women’s entertainment network). In opposing the Complaint, the Enforcement Bureau parrots Cablevision’s argument. *See Game Show Network, LLC v. Cablevision Systems Corp.*, MB Docket No. 12-122, Enforcement Bureau’s Comments (filed Oct. 15, 2015) at 10.

²⁹¹ The Commission’s rules provide that proof of network similarity in a program carriage discrimination dispute must be “based on a combination of factors, such as genre, ratings, license fee, target audience, target advertisers, target programming, and other factors.” 47 CFR § 76.1302(d)(3)(iii)(B)(2)(i). The Presiding Judge notes that “marketing” is not one of the factors enumerated by the Commission. In addition, because the nature of marketing is to distinguish one entity from another, examination of that factor in this dispute was not useful in determining whether GSN and WE tv are similarly situated networks. *See* Tr. at 414:11-16, 418:2-10 (Goldhill testified that “GSN, like all networks, attempts to differentiate itself,” and is “always trying to differentiate [it]self in any discussion with a customer, whether an affiliate, an advertiser or a viewer” because “[n]obody says, hey, we’re one of eight networks that shows the same thing.”); *id.* at 418:21-25 (Goldhill persuasively explained that GSN’s “goal in any sort of presentation with a customer is to stand out, is to look like a different, greater, better value . . . [w]e are never in the box with other networks.”). *Compare* Martin Testimony at 63-64 (Martin testified that Wedding Central differentiated itself from other women’s networks “for [cable] distributors, for viewers and for advertisers.”)

making its argument on genre, or any inconsistent statement in his testimony regarding GSN's target programming and target audience, is vastly outweighed by the credible testimony of GSN fact witnesses Goldhill, Hopkins, and Goode, and expert witness Brooks. These witnesses testified that at the time of retiering, GSN was properly described as a women's network. Also, regardless of how GSN marketed its service to Comcast in 2009 or to cable distributors in general, Gillespie testified that he personally informed Cablevision (via Montemagno) that GSN's target audience "was comprised . . . mostly of females" and that the network "was delivering females more than male."²⁹² Moreover, Gillespie admitted that he was "not an expert on programming" and thus had no basis on which to determine that any particular GSN show "appealed to women or men."²⁹³ To clarify his position, Gillespie identified GSN's "Senior Vice President of programming . . . Kelly Goode" as the person knowledgeable about the target audience for GSN's programming.²⁹⁴ And Goode unequivocally testified that "family-friendly" *is* a category or subcategory of women's network programming. It *is not* programming targeted to men and women to watch together²⁹⁵ as Cablevision unconvincingly attempts to argue.²⁹⁶

b. Target Programming

59. Cablevision expert Michael Egan testified that particular television shows "are not genre" but they "fall within a genre."²⁹⁷ Egan further testified that a cable network's "defining target programming" is "where they most purely communicate their target programming and their target audience."²⁹⁸ GSN expert Brooks similarly testified that "the target audience of a network is best defined by the demographic orientation of the programming it purchases and airs, and the audience that is attracted to that programming."²⁹⁹ He also testified that "GSN, WE tv, and Wedding Central are each strongly women-oriented networks."³⁰⁰ Brooks further testified that "[g]ame shows, wedding shows, dating shows, and family dynamic shows all appeal primarily to women."³⁰¹

²⁹² Gillespie Testimony at 25. Gillespie also testified that he consistently informed cable distributors that GSN "serve[d] women's audience." *Id.* at 27.

²⁹³ *Id.* at 28.

²⁹⁴ *Id.* at 29-30.

²⁹⁵ Goode Testimony at 83 (Goode testified that family-friendly programming is women's programming "that a woman could watch without making a child in the room completely embarrassed."). *See also* Tr. at 313:6-10 (Goldhill testified that GSN's "programming is family friendly, which means Mom can watch with kids" and that "[f]amily friendly does not mean Dad; it means Mom and kids").

²⁹⁶ *See* Cablevision Br. at 12-13. Cablevision also contends that even if GSN targets and appeals to women, GSN still cannot be properly described as a women's network that is similar to WE tv (and presumably Wedding Central). As Cablevision expert Orszag testified, just because History Channel and ESPN "both have a high share of male viewership" does not "imply that the viewers consider watching the History Channel to be a close substitute to watching ESPN." Orszag Expert Testimony at 75; *see also* Tr. at 2532:5-2533:23 (Orszag made a similar comparison between Showtime's *Homeland* and Comedy Central's *Daily Show with Jon Stewart*, and testified that his analysis was not based on programming "genre" but concerned only "how people are actually watching TV"). In contrast to History Channel and ESPN, two networks that are not in the same network genre, the preponderance of record evidence, which for the most part is undisputed (*see infra* paras. 59-68), shows that at the time of retiering, GSN, WE tv, and Wedding Central were each women's networks offering similar target programming and targeting the same adult female audience.

²⁹⁷ Tr. at 2291:19-20.

²⁹⁸ Tr. at 2290:3-7.

²⁹⁹ Brooks Expert Testimony at 51.

³⁰⁰ *Ibid.*

³⁰¹ *Ibid.*

(i) GSN Target Programming

60. Egan testified that GSN's defining target programming "is their game show programming."³⁰² Game shows, like soap operas, are by their very nature the type of programming that generally is targeted to an adult female audience.³⁰³ Brooks testified that "GSN's performance with women is consistent with the widespread understanding in the industry that game shows are generally targeted at women."³⁰⁴ Brooks also testified that game shows are generally synonymous with women-oriented programming in much the same way that sports programming is generally deemed to be targeting men.³⁰⁵

61. Brooks testified that GSN "occasionally [aired] shows that aren't game shows at all" but "everything [else] is sort of under the huge umbrella of game show."³⁰⁶ Goode testified that *The Newlywed Game*, one of GSN's marquee shows, was not so much a game show as it was "a relationship comedy . . . using [a game show] studio format."³⁰⁷ Goode also testified that another marquee show—*Baggage*—was not a game show at all.³⁰⁸ According to Goode, shows like *Baggage* instead fall "in their own category" of "relationship shows," which she testified is "shorthand for shows about love, dating, marriage, that sort of thing."³⁰⁹ Brooks similarly testified that the target programming "featured on GSN

³⁰² Tr. at 2290:3-7.

³⁰³ Under vigorous cross-examination, Brooks unequivocally confirmed that game shows currently and historically attract an adult female audience. Tr. at 1262:18-1270:3; *see also id.* at 1261:9-12 (Brooks testified that "[g]ame shows tend to attract both younger and older viewers" while "other types of women's programming doesn't" and so he was not surprised that "in addition to the younger [female demographic] categories [GSN] would get older ones too."); *id.* at 1269:9-16 (Brooks testified that his analysis addressed whether game shows "appeal to women or are they gender balanced," and he determined that game shows are "not gender balanced" but "skew toward women").

³⁰⁴ Brooks Expert Testimony at 53. Brooks further testified that "[t]he notion that game shows cater primarily to women is also noted in [industry] literature." *Id.* at 54 and n.123 (citing Edd Applegate, *Journalism in the United States: Concepts and Issues* (2011), Anne Cooper-Chenn, *Games in the Global Village: A 50-Nation Study of Entertainment Television* (1994) (*Games in the Global Village*), and Morris B. Holbrook, *Daytime Television Game Shows and the Celebration of Merchandise: The Price is Right* (1993)).

³⁰⁵ "Games Shows (mind sports) function for female viewers in much the same way that TV athletic contests function for males." Brooks Expert Testimony at 54 n.123 (quoting *Games in the Global Village* at 18).

³⁰⁶ Tr. at 1200:14-20; *see* Brooks Expert Testimony at 4-5 (Brooks testified that GSN's "programming consists primarily of competition-based shows of various types, along with other reality-based programs, that, . . . , appeal to an audience that is predominantly female."); Tr. at 1191:17-19 (Brooks testified that by looking at GSN's programming schedules during the time of retiering, he "determined that most of the programs were competition based game shows . . . of one kind or another."); *see also* Cablevision Br. at 10 (at the time of retiering, "GSN's programming schedule [was] dominated by game and competition shows, including poker"). However, as discussed *supra* para. 54, the poker programming that Cablevision references did not dominate GSN's programming schedule but in fact was isolated because poker was inconsistent with GSN's target programming. *Cf.* Tr. at 1842:3-1849:17 (Dorée testified that WE tv discontinued airing *20/20*, *48 Hours*, and *60 Minutes* because news programming was inconsistent with WE tv's brand); Martin Testimony at 134 (Martin testified that WE tv's brand is that "it's a women's network").

³⁰⁷ Goode Testimony at 50.

³⁰⁸ Goode Testimony at 100. Goode also testified that other GSN original shows—e.g., *I vs. 100*, *Carnie*, and *Love Triangle*—were not game shows. *Id.* at 101. Concerning *I vs. 100*, Goode testified that GSN "was very specific in terms of how we cast the show and the host . . . to make the comedy and entertainment elements, first and foremost," and so GSN brought in "Carrie Ann Inaba," "this great female host that women loved from 'Dancing with the Stars,'" and also "thought very carefully about the kinds of people in the 100," and so purposefully included in the cast "[i]nteresting women . . . a nun . . . schoolteachers . . . [and] cute guys that would appeal to women." *Id.* at 100, 105.

³⁰⁹ *Id.* at 101.

fall[s] into four broad categories that are well recognized in the industry”: (1) relationship games (e.g., *Baggage*, *The Newlywed Game*, *Love Triangle*, and *Family Feud*); (2) celebrity games (e.g., *Match Game* and *\$25,000 Pyramid*); (3) big money games (e.g., *Deal or No Deal* and *1 vs. 100*); and (4) quiz games (*Card Sharks*, *Lingo*, and *Chain Reaction*).³¹⁰

62. The game show and game show-like programming that aired on GSN at the time of retiering falls under the programming genre that is modernly referred to as reality competition, which is a subcategory of reality programming.³¹¹ Egan testified, however, that GSN’s target programming is not reality competition programming. In contrast to the type of show that falls under the reality/reality competition programming genre, Egan testified that the “essential” characteristic of a game show “is that it is a *contest* (a ‘*game*’) with winners and losers (and prizes),” and he testified that the “defining attributes” of a game show are: (1) a scripted show, (2) a host or master of ceremonies, (3) simple and highly formalized production techniques, (4) repeated use of a single set in one location, and (5) a vocal studio audience.³¹² It is noted that Egan’s defining attributes of a game show would apply equally to televised programming that is not commonly referred to as a game show like, for example, the *Miss America Pageant* and the *Scripps National Spelling Bee*. In addition, all or most of these defining attributes also apply equally to *Survivor*, *American Idol*, and *The Voice* – which are the shows that Egan testified fall under the reality competition programming genre.³¹³ Egan also testified that *America’s Funniest Home Videos*, another show falling under the reality competition programming genre, “sounds to me like a game show.”³¹⁴ Egan’s overarching assertion that game show programming is distinct and mutually exclusive of reality competition programming is rejected as not credible and contradicted by the preponderance of substantial record evidence.³¹⁵

(ii) WE tv and Wedding Central Target Programming

63. Egan testified that WE tv’s “defining target programming is their reality programming” as represented by *Bridezillas*, a marquee show that aired on WE tv at the time of retiering.³¹⁶ WE tv President Martin similarly testified that WE tv’s target programming was “reality programming.”³¹⁷ Wedding Central’s target programming “primarily featured wedding-themed programming” that had

³¹⁰ Brooks Expert Testimony at 5.

³¹¹ See generally Brooks Expert Testimony at 56-58; cf. CV Exh. 332—Direct Testimony of Michael Egan (Egan Expert Testimony) at 76-77 (Egan testified that “the birth of the Reality genre” occurred “in 1973” and “that 2000 was the kick-off of its offspring, which years later became known as the Reality-Competition sub-genre” (italics omitted)).

³¹² Egan Expert Testimony at 22-24 (emphasis in original); see also Tr. at 2322:5-10 (Egan testified that a game show is “most fundamentally . . . a competition going on with prizes awarded to winners”).

³¹³ Egan Expert Testimony at 26 n.26.

³¹⁴ Tr. at 2376:22. Cf. Martin Testimony at 61 (Martin testified that *Dancing with the Stars*, *Amazing Race*, and *Deal or No Deal*—shows which aired on GSN at the time of retiering or shortly thereafter, see *supra* para. 61; Brooks Expert Testimony at 5, 57; Egan Expert Testimony at 80, 127—“are all competition shows . . . [c]ompetition reality”).

³¹⁵ See Egan Expert Testimony at 21 (Egan testified that the “Reality and Game Show genres . . . are readily recognizable as distinct and standalone genres”). But see Brooks Expert Testimony at 55-56 (Brooks testified that “almost all genres overlap with other genres . . . some long-established genres such as ‘situation comedy’ and ‘sports’ are relatively well defined, however ‘reality’ is a recently invented label that has been applied to, and overlaps with a multitude of programming types . . . includ[ing] . . . game shows”).

³¹⁶ Tr. at 2289:17-2290:6; see also Egan Expert Testimony at 6 (Egan testified that WE tv’s target programming is “family and romantic relationship-themed Reality shows”).

³¹⁷ See Martin Testimony at 51.

previously aired on WE tv.³¹⁸ The similarity of target programming between GSN and WE tv (and Wedding Central) is further proven by the fact that couples featured on WE tv's marquee show *Bridezillas* were also featured as such on GSN's marquee show *The Newlywed Game*.³¹⁹ In addition, prior to the retiering, WE tv even aired its own original game show, *Most Popular*,³²⁰ and before it was shuttered in 2011, Wedding Central announced that it would begin airing *The Newlywed Game*.³²¹

64. Cablevision contends that GSN and WE tv (and presumably Wedding Central) are not similar women's networks because GSN "does not air the same type of women-oriented programming as does WE tv."³²² But it is not necessary to the finding of similarity that the networks air the *same type* of women-oriented programming. For instance, Martin testified that even though WE tv's programming never included a soap opera, SoapNet was nevertheless a similar women's network because SoapNet "delivered women, [in] large numbers."³²³ Moreover, in *Tennis Channel*, the Presiding Judge found that a cable network that aired sports programming dedicated to tennis was similar to a cable network that aired sports programming dedicated to golf, as well as similar to a cable network that aired a variety of sports programming³²⁴—findings that were later adopted by the Commission and left undisturbed by the D.C. Circuit.³²⁵ In light of the proven fact that GSN, WE tv, and Wedding Central each aired women-oriented

³¹⁸ Dorée Testimony at 15; *see also* Martin Testimony at 55 (Martin testified that 100 percent of Wedding Central's programming related to weddings).

³¹⁹ Tr. at 592:7-13 (Hopkins testified that "Bridezillas was a show on WE tv that actually was about women getting married and the crazy things that happen on the way to their biggest day . . . [a]nd so . . . we took the couples from Bridezilla [sic] and actually put them on the Newlywed Game").

³²⁰ *See* Dorée Testimony at 14 (Dorée testified that "during the 2009 to early 2011 time period, WE tv aired only one game show, *Most Popular*"); GSN Exh. 25 (6/29/09 press release announcing the premiere of WE tv's "new original game show, *Most Popular*" and that "WE tv viewers will get a sneak peek of the series with a special bridal episode . . . featuring recent and soon-to-be brides as well as several brides who appeared in the current sixth season of WE tv's hit signature series, *Bridezillas*"); *see also* Tr. at 1360:11-20 (Brooks testified that he watched *Most Popular* when it aired on WE tv, and it was typical of the programming that aired on GSN).

³²¹ GSN Exh. 76 at 8; *see also* Tr. at 1359:17-23 (Brooks testified that Wedding Central planned to air a version of *The Newlywed Game* that had previously aired on GSN).

³²² Cablevision Br. at 11. *See also* CV Exh. 233—Direct Testimony of Hal Poret (Cablevision expert Poret surveyed viewers to determine the degree to which they considered paired networks—for example, HBO and Cinemax, MTV and VH1, GSN and MTV, GSN and WE tv, Lifetime and Oxygen, and Oxygen and WE tv—offer comparable types of programming; it is not remarkable or material that viewers generally did not view GSN, which primarily and uniquely offers game show programming, as offering the same type of women-oriented programming as WE tv).

³²³ Martin Testimony at 50-51. *Cf.* Tr. at 1253:5-7 (Brooks testified advertisers are concerned only with how many viewers of the sought-after demographics are delivered by the network and not with who else is watching the programming "because the rest is all bonus").

³²⁴ *Tennis Channel*, 26 FCC Rcd at 17170-85, paras. 24-52.

³²⁵ 27 FCC Rcd 8527-33, paras. 51-67; *see* 717 F.3d at 985. Beyond the finding of similarity between non-affiliated and affiliated networks, *Tennis Channel* is of limited applicability in this case. In *Tennis Channel*, a non-affiliated network complained that a cable distributor discriminated on the basis of affiliation/non-affiliation by declining, on the basis of cost, the non-affiliated network's proposal for the same broad carriage that the cable distributor afforded to its similarly situated affiliated networks. *See* 717 F.3d 984-85. In contrast to this case, there was no direct evidence of discrimination in *Tennis Channel*. Nor did the non-affiliated network "invoke[] the concept that an otherwise valid business consideration is here merely pretextual cover for some deeper discriminatory purpose." *Id.* at 987. The court thus determined that to prove discrimination based on circumstantial evidence, the non-affiliated network was required to show that the additional fees that the cable distributor would have been incurred from the proposed broad carriage would have been offset by benefits that would have accrued to the cable distributor. For example, the court opined that the non-affiliated network could have shown that the cable distributor would have gained subscribers by distributing it broadly (or conversely, that the cable distributor would have lost subscribers in the absence of affording the non-affiliated network broad carriage); or could have shown that "the incremental

(continued....)

programming at the time of the retiering, it is not material that GSN's women-oriented programming primarily consisted of game shows contrary to WE tv's and Wedding Central's programming which did not.

c. Target Audience

65. The preponderance of substantial and undisputed record evidence clearly and convincingly proves that GSN targeted the same women viewers that were targeted by WE tv and Wedding Central. GSN President Goldhill testified unequivocally that the target audience for GSN's target programming was primarily women 25-54, next women 18-49, and then women of any age.³²⁶ WE tv and Wedding Central President Martin testified unequivocally that the target audience for WE tv's target programming also was women 25-54, and similarly women 18-49 were the target audience for Wedding Central.³²⁷

66. As head of GSN programming, Goode testified that her fundamental task was "to appeal to an audience that was watching different genres out there: docusoaps; other forms of competition, reality shows; lifestyle shows like food, home decor, fashion; love and relationship shows" but were "out there watching these shows in other places" and "serve them by showing them relatable things about their lives: getting married, dating, decorating their house, dealing with their kids, all of those sorts of things."³²⁸ The overwhelming weight of substantial record evidence leaves no doubt that GSN was targeting the same women viewers who were being targeted by WE tv and Wedding Central. For example, WE tv described its target audience—i.e., "The WE tv Woman"—in part, as "women who shop at J.C. Penney's, Macy's, Target and Walmart, not Nordstrom's unless they have a special discount coupon . . . [who] are proud to watch shows like 'American Idol' and 'Dancing with the Stars'."³²⁹ It is

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losses" from distributing the non-affiliated network broadly "would be the same as or less than the incremental losses" the cable distributor was incurring from distributing its similarly situated affiliated networks broadly. *Id.* at 986. This case is also factually and legally distinguishable from *Tennis Channel*. For instance, as noted by the court, the non-affiliated network in *Tennis Channel* was not being distributed on the same tier as the similarly situated affiliated networks. *Id.* at 987 ("If accompanied by evidence that (assuming Golf and Versus had been on the sports tier at the time of Tennis's proposal in 2009) a shift of them to broader coverage would have yielded incremental revenue equivalent to what Tennis demanded in 2009, the comparative data might have done the job."). In this case, however, Cablevision distributed GSN as broadly as it distributed seven of its affiliated networks, and more broadly than it distributed three other affiliated networks. *Supra* para. 19 and note 80. But purportedly to save programming costs, Cablevision shifted GSN—and only GSN—from its second most broadly penetrated tier to the premium sports tier, Cablevision's most narrowly penetrated tier, and a tier on which Cablevision only distributed non-affiliated networks. *See supra* paras. 18-20. Moreover, Cablevision does not dispute that it would have saved significantly more by retiering one of its affiliated networks, including WE tv. *See infra* para. 107; Tr. at 2653:11-2654:20 (Cablevision expert Orszag testified that Cablevision, which paid WE tv a license fee of { [REDACTED] }) at that time, would have saved more by retiering WE tv than Cablevision saved by retiering GSN, for which it paid a license fee of { [REDACTED] }). Cablevision instead disputes that GSN and WE tv are similarly situated networks, and therefore that it was permissible for Cablevision to discriminate on the basis of non-affiliation in moving GSN from the expanded basic tier to the premium sports tier. Tr. at 112:23-25 (under section 616 Act, "if the networks are not similarly situated, [Cablevision] can discriminate"); *see also infra* para. 114.

³²⁶ *Supra* para. 55. *Cf.* Tr. at 718:4-11 (Zaccario testified that because GSN's "original programming [was] aimed at women 25 to 54," as head of advertising for GSN, his "mandate" was that GSN's "[advertising] sales strategy align with our programming strategy to reach women 25 to 54").

³²⁷ Martin Testimony at 52, 54 (Martin testified that WE tv's "target audience is a 35-year-old-woman" and that "the sweet spot for the Wedding Central viewer was a [younger] woman who was between 25 and 35"); *see also* Tr. at 1764:15-17 (Dorée testified that the target audience for WE tv was women 25-54).

³²⁸ Goode Testimony at 32.

³²⁹ Martin Testimony at 147-48 (internal quotation marks omitted). Brooks testified that "[t]he statistics for game shows and quiz shows in particular are that they appeal to middle class and down kinds of viewers"—these

(continued....)

noted that *Dancing with the Stars* never aired on WE tv (or Wedding Central) but did air on GSN,³³⁰ and that *American Idol* is a game show.³³¹

67. Cablevision's own expert analysis shows that "Cablevision subscribers who lost access to GSN after the retiering" increased their viewership of WE tv and Wedding Central.³³² GSN's expert analysis similarly shows that, like the majority of other women's networks that Cablevision continued to distribute on the expanded basic tier, "WE tv saw healthy gains" in viewership as a result of GSN's retiering to the premium sports tier.³³³ Cablevision's affiliated network thus benefitted from GSN's retiering.

68. In addition, Cablevision's expert analysis of the "GSN Retiering Viewership Effect" showed that of the women's networks included in a pool of 87 broadcast and cable networks, only SoapNet's viewership increased more than WE tv's.³³⁴ And Cablevision's expert switching analysis similarly showed that out of these 87 networks, "when somebody's watching GSN" they switch to 21 other networks more often than they switch to WE tv,³³⁵ and that WE tv viewers switched to 32 other channels more often than switching to GSN.³³⁶ The analysis shows that WE tv viewers primarily switched to Bravo and AMC, followed by Lifetime.³³⁷ In addition to women's networks Bravo and

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"socioeconomic groups . . . are very interested in game shows because it's a way of sharing the good fortune of someone else in getting dates or winning money, something like that." Tr. at 1268:8-18.

³³⁰ See *supra* note 314.

³³¹ See *supra* para. 62.

³³² See Cablevision Br. at 12 (consistent with its expert Orszag's conclusion, Cablevision does not dispute that WE tv and Wedding Central enjoyed increased viewership due to displaced GSN expanded basic viewers; Cablevision contends instead that the resulting increase in viewership was not "meaningful[]"). See also Tr. at 2526:6-2528:1 (Orszag testified that "the Cablevision subscribers who previously subscribed or . . . no longer could view GSN because they no longer had access to the sports tier" amounted to "a roughly 1.4 seconds increase in [WE tv] viewership due to the retiering of GSN" but the "1.4 seconds is so small" that "there would be no incentive or no economic benefit to WE from the retiering of GSN").

³³³ Brooks Expert Testimony at 30. Brooks also testified that, with the exception of Bravo, none of the women's networks experienced on a national basis "the gains in female audience experienced by GSN's competitors following the retiering of GSN on Cablevision systems"). *Id.* at 32. Brooks further testified that "when GSN was removed by Cablevision from general distribution on its New York area systems, the ratings of five out of six female-oriented competitors went up in New York, and that increase in ratings cannot be explained by national trends." *Id.* at 33. At hearing, Brooks testified that during the same post-retiering ratings period, GSN's ratings in the lucrative New York DMA dropped 80-88 percent and WE tv's ratings increased 21-43 percent; WE tv's ratings did not increase nationally. See Tr. at 1364:12-1366:5.

³³⁴ Orszag Expert Testimony at 34. Of 87 broadcast and cable networks examined, Orszag testified that "the viewers who lost access to GSN watched 6.7 seconds per day more of CNN," which was the network that experienced the greatest increase in viewership as a result of GSN's retiering. Tr. at 2527:3-7. Of the women's networks included in the pool, SoapNet experienced the greatest increase (which ranked 8 out of 87), followed by WE tv (which ranked 16 out of 87) and Wedding Central (which ranked 32 out of 87). Orszag Expert Testimony at 34. The other women's networks that experienced an increase in viewership as a result of GSN's retiering were Lifetime (which ranked 38 out of 87), Oxygen (which ranked 48 out of 87), and Style (which ranked 50 out of 87). *Ibid.* Women's networks Bravo and E! did not experience an increase in viewership as a result of GSN's retiering. *Ibid.*

³³⁵ Tr. at 2534:22-2535:1. The switching analysis shows that GSN viewers primarily switched to ABC, followed by CBS, and then to SoapNet. In addition to women's network SoapNet, GSN viewers switched to Oxygen and Lifetime more often than they switched to WE tv; but GSN viewers switched to Bravo, E! and Wedding Central less often than they switched to WE tv. Orszag Expert Testimony at 47.

³³⁶ Tr. at 2534:6-10.

³³⁷ Orszag Expert Testimony at 40.

Lifetime, WE tv viewers switched to E! and SoapNet more often than they switched to GSN.³³⁸ But WE tv viewers switched to Oxygen and Wedding Central less often than they switched to GSN.³³⁹ This fact in particular—i.e., that WE tv viewers switched to GSN significantly more often than they switched to Wedding Central—demonstrates the substantial commonality among the three networks’ target audience because WE tv and Wedding Central had virtually identical programming that indisputably targeted the same audience.³⁴⁰

d. Actual Audience

69. Cablevision recognizes that GSN and WE tv “both skew more heavily to women viewers than men,” yet Cablevision rejects that the networks are similar because “GSN and WE tv attract very different audiences.”³⁴¹ But the preponderance of substantial and undisputed evidence proves that each network targeted the same audience. Still, Cablevision argues that “the evidence shows . . . that GSN has both an older and more male [actual] audience than WE tv.”³⁴² The evidence of the composition of GSN’s actual audience, however, is vastly outweighed by the proven fact that GSN targets the same female adult audience targeted by WE tv and Wedding Central; and as discussed above (*see* paragraphs 59-64), the target programming of each network is women-oriented programming. Compare *WealthTV*³⁴³ where the Commission upheld the Presiding Judge’s finding that non-affiliated WealthTV and affiliated MOJO were not similarly situated networks because they “neither aired the same type of programming, nor targeted the same audience.”³⁴⁴ In denying review of the Commission’s order, the court rejected WealthTV’s argument that the record evidence relied on in the administrative proceeding was “describing WealthTV’s *actual* audience” but was “misconstrued by the FCC as describing its *target* audience.”³⁴⁵

70. For it is a network’s target audience, not its actual audience, that drives advertising and programming decisions.³⁴⁶ GSN’s expert Brooks opined that an advertiser “targets and focuses on the demographics that the advertiser wants to reach, not the ones that the advertiser doesn’t want to reach” because any viewer the advertiser reaches outside of the target demographic “is essentially free

³³⁸ *Ibid.*

³³⁹ *Ibid.*

³⁴⁰ *See ibid.*; Dorée Testimony at 15 (Dorée testified that Wedding Central’s target programming primarily consisted of wedding-themed shows that had previously aired on WE tv). *Cf.* Brooks Expert Testimony at 19 (Brooks testified that Cablevision’s expert analysis showed that “Wedding Central is next to the bottom of networks tuned to by WE tv viewing households, far below GSN, even though Wedding Central’s programming was virtually identical to that on WE tv.”).

³⁴¹ Cablevision Br. at 4.

³⁴² *Id.* at 14. *But see* Tr. at 1256:15-18 (Brooks testified that the fact that GSN has older viewers in its actual audience is not “relevant and important”).

³⁴³ *Herring Broad. Inc. d/b/a WealthTV v. Time Warner Cable, Inc.*, Recommended Decision of Chief Administrative Law Judge Richard L. Sippel, 24 FCC Rcd 12967 (ALJ 2009), *aff’d*, 26 FCC Rcd 8971 (2011), *aff’d sub nom. Herring Broad. Inc., v. FCC*, 515 Fed. Appx. 655 (9th Cir. 2013) (*WealthTV*).

³⁴⁴ 24 FCC Rcd at 12976, para. 20; 26 FCC Rcd at 8980, para. 26 (the Commission concluded that “substantial record evidence supports the ALJ’s conclusion that WealthTV and MOJO did not target similar audiences”).

³⁴⁵ 515 Fed. Appx. at 657 (emphasis added).

³⁴⁶ *See* Tr. at 550:3-6 (Goldhill testified that among women’s networks “the competition is about advertising dollars, which means producing the demos that advertisers buy, in our case women 25 to 54,” and so GSN’s “focus really is on 25 to 54 delivery”). *See also id.* at 839:21-840:3 (Zaccario testified that there is a correlation between programming and advertising because if the programming attracted “women 25 to 54 to the network . . . the better we did on selling [advertising] against women 25 to 54” which in turn “would validate the effort that they [would] have made to bring those women to the network”).

audience.”³⁴⁷ Brooks also testified that the fact that GSN has older viewers in its actual audience is not “relevant and important in terms of its ad sales.”³⁴⁸ Brooks further testified that “programming people” are similarly unconcerned “[i]f there’s lots of older viewers” because their focus is “to deliver a particular target . . . [a]nd it doesn’t matter what else they deliver.”³⁴⁹ As head of GSN programming, Goode similarly testified that the objective of target programming was not to “drive down” the composition of GSN’s actual audience “but to appeal to women 18 to 49, 25 to 54, to go for that core viewer that we needed to appeal to” and “serv[e] that audience with relatable programming.”³⁵⁰ Goode further testified that although GSN’s programming was “intended to appeal to a certain set more than other groups,” GSN did not “want to alienate another group” but was “looking to entice first and foremost one group” with its target programming.³⁵¹ Regarding WE tv’s marketing strategies, Martin similarly testified that despite being a women’s network, WE tv never used the term “women” in the network’s tagline so as not to alienate men because men accounted for 20 percent of WE tv’s actual audience.³⁵² In any event, as Brooks’s expert analysis of GSN and WE tv’s shared viewing audience³⁵³ demonstrated, at the time of the retiering, approximately one-third of the viewers “who watched either GSN or WE tv watched both,” and in fact, “WE tv ranked first among all cable networks in terms of shared audience with GSN.”³⁵⁴

e. Advertising

71. Brooks testified that “[w]hile no network is viewed 100% by a female or male audience, ad buyers nonetheless view networks as female- or male-targeted and buy advertising on that basis.”³⁵⁵ Brooks credibly testified that the top four advertising demographic “categories for women’s networks are women 25-54, persons 25-54, women 18-49 and persons 18-49.”³⁵⁶

³⁴⁷ *Id.* at 1346:5-11.

³⁴⁸ *Tr.* at 1256:15-18.

³⁴⁹ *Id.* at 1370:17-22. Brooks further testified that if a programmer is targeting women 25-54, for example, “what they’re focused on is increasing the number under women 25 to 54” demographic category, and are “not concerned with what goes on in other demographics” because “[w]hat they really want is the largest number possible in the demographic they’re aiming for.” *Id.* at 1371:9-23. *Cf.* GSN Exh. 310 (7/8/09 internal WE tv email that expresses “concern” that ratings for *Bridezillas* in target audience categories of “W18-34, 18-49, and W25-54 are all down” but appreciation that the ratings for “MEN are up 117% among 35-49s, double among 50+, and more importantly[, up] 56% among M18-49”) (capitalization in original).

³⁵⁰ Goode Testimony at 21.

³⁵¹ *Id.* at 22.

³⁵² Martin Testimony at 135-37.

³⁵³ Brooks explained that “[s]hared viewing is the percent of combined audience of two networks that watches both.” Brooks Expert Testimony at 19.

³⁵⁴ *Id.* at 18-19. Brooks also convincingly explained why Cablevision expert Orszag’s all-viewing analysis was less probative than his shared-viewing analysis. *Id.* at 19, 47-48.

³⁵⁵ Brooks Expert Testimony at 15; *cf.* *Tr.* at 1229:9-14 (Brooks testified that even though 25 percent of ESPN’s viewers are female and “does sell female demographics . . . the predominant [ad] sales are men for ESPN”).

³⁵⁶ Brooks Expert Testimony at 15-16; *see also* *Tr.* at 840:20-841:3 (GSN advertising head Zaccario testified that the advertising target demographic category of women 25-54 is critical “for GSN and other networks that are producing programming and targeting women 25 to 54” but this category “wouldn’t be as important for ESPN”). *Cf.* GSN Exh. 310 (7/8/09 internal WE tv email noting that an increase in number of male viewers of WE tv’s marquee show *Bridezillas* “does help Ad Sales, which is not just selling women but, more than ever, ADULTS 18-49s as well”); *see also* *Tr.* at 1764:5-17 (Dorée confirmed that even though its programming was targeted to women, WE tv tracked ratings for men and adults and sold advertising based on person and/or adult demographics). The Presiding Judge rejects as erroneous, and contradicted by substantial undisputed evidence, Martin’s conflicting testimony that

(continued....)

72. Regarding target programming, GSN and WE tv sold two types of advertising: direct response and general rate.³⁵⁷ Goldhill testified that both direct response advertising and general rate advertising are “sold based on audience composition”—the difference being that the network guarantees delivery of the target demographic with general rate advertising but does not with direct response advertising.³⁵⁸ Goodhill testified that in GSN’s case, “when we sell direct response, our advertisers still want to know the demographics of our audience, we’re just not guaranteeing it.”³⁵⁹ Goodhill further testified that “our direct response, like all our advertising, is sold to advertisers who want a 65 to 70 percent female network.”³⁶⁰ Zaccario testified that at the time of retiering, the percentage split between GSN’s general rate advertising and direct response advertising was “[r]oughly { [REDACTED] }.”³⁶¹ Zaccario also testified that during the period 2008-12, the demographic category women 25-54 accounted for the largest portion of GSN’s general rate advertising.³⁶² Zaccario further testified that the demographic category “women 25 to 54 is the most important [to GSN] because that is where we write the overwhelming majority of our [advertising] business.”³⁶³

(i) Target Demographic

73. The target demographic for advertising sales is determined by the advertiser, not the network. Goldhill testified that “[t]here are advertisers who buy only women,” “[t]here are advertisers who prefer to buy adults or persons,” and “[w]e will sell to both.”³⁶⁴ Goldhill also testified that “[i]f an advertiser walks in and says, ‘[w]e want you to price adults,’ we will do so,” but “[t]here are some [GSN] shows which are so overwhelmingly female that we cannot do that because the number is the same as the female number.”³⁶⁵ And Goldhill testified that, because women accounted for “65 to 70 percent” of GSN’s audience, regardless of whether GSN was selling direct response advertising or general rate advertising “[m]any of the advertisers who b[ought] adults” were nevertheless “trying to get primarily women.”³⁶⁶

74. Brooks testified that advertisers generally are not concerned with the composition of a network’s actual audience but focus on the demographic they are interested in reaching. So, for example, what advertisers want to know from a network is “how many women 18 to 49 can you deliver, and how much are you charging for them.”³⁶⁷ And a network’s delivery of viewers beyond the target demographic

(Continued from previous page) _____

WE tv did not sell advertising based on people or adult demographics but only sold advertising based on “women 18-49 [and] women 25-54.” Martin Testimony at 37-38; *see also id.* at 160-61.

³⁵⁷ The record contains insufficient evidence to make any findings of fact regarding Wedding Central advertising.

³⁵⁸ Tr. at 261:7-23; *see also id.* at 811:7-11 (Zaccario testified that direct response advertising is sold based on a target demographic that advertisers “track internally” even though delivery of the target is not guaranteed by the network).

³⁵⁹ *Id.* at 261:9-11.

³⁶⁰ *Id.* at 261:13-15.

³⁶¹ *Id.* at 810:16.

³⁶² *Id.* at 812:13-22 (Zaccario also testified that guaranteed delivery of women 25-54 accounted for “[t]hirty-one percent” of GSN’s general rate advertising).

³⁶³ *Id.* at 840:22-23.

³⁶⁴ *Id.* at 288:7-9.

³⁶⁵ *Id.* at 288:17-20.

³⁶⁶ *Id.* at 288:13-15.

³⁶⁷ *Id.* at 1228:19-23. *Cf.* Martin Testimony at 228 (from the perspective of WE tv’s advertising sales, Martin testified that the “most important thing is the amount of viewership that we have” because “[a]dvertisers . . . are really looking for eyeballs”).

“is all bonus” for the advertiser.³⁶⁸ Brooks finally testified that if in addition to “the target demographic” the advertiser “gets other viewers, such as 55-plus viewers they’re not paying for, that is essentially bonus, free bonus audience that they are getting.”³⁶⁹

75. Brooks’s expert testimony showed that “persons and women 18 to 49 and 25 to 54 accounted for about two thirds of the demographic ad sales of GSN . . . the other third were other demographics . . . like 35 to 64, 18 plus, . . . demos that are sometimes bought by advertisers at lower degrees.”³⁷⁰ Zaccario testified that at the time of retiering, women 25-54 alone accounted for nearly 40 percent of GSN’s upfront advertising sales.³⁷¹ Zaccario also testified that the second largest portion of GSN’s upfront advertising sales was women 18-49, and that the combined demographic category of women 18-54 accounted for “over 55 percent” of GSN’s upfront advertising sales at the time of retiering.³⁷² During that time, GSN did not sell any upfront advertising in the demographic category women 55 and above but only sold “a very small percentage” of advertising based on persons 55 and above; Zaccario testified that “had there been [advertisers] in the marketplace looking to . . . buy women 55-plus, we would have sold it.”³⁷³ However, Zaccario assured that GSN never sold any advertising for its target programming that was based on any target demographic category of men.³⁷⁴

(ii) Target Advertisers

76. GSN expert Singer showed that “between July 2010 and July 2011, 90 percent of WE tv’s top 40 advertising accounts . . . also advertise on GSN,” and “that 93 percent of GSN’s top 40 advertising accounts . . . also advertise on WE tv.”³⁷⁵ His testimony on the advertising universe for each network also showed an overwhelming similarity in advertising between GSN and WE tv.³⁷⁶ Singer concluded that “74 percent of *all* of WE’s advertising accounts . . . also advertise on GSN” and “82 percent of *all* of GSN’s advertising accounts . . . also advertise on WE tv.”³⁷⁷

³⁶⁸ Tr. at 1253:5-7. Brooks further testified the existence of “many older viewers” in its actual audience is not “relevant and important in terms of [GSN’s] ad sales.” *Id.* at 1256:15-18. Brooks also testified that “[w]hereas some other types of women’s programming doesn’t[, g]ame shows tend to attract both younger and older viewers,” and so he was not surprised that “in addition to the younger categories,” GSN’s programming also appealed to the “older ones too.” *Id.* at 1261:9-12.

³⁶⁹ *Id.* at 1333:7-11. Brooks further testified that “what is important in [advertising] sales is, did you deliver the needed number of people within the demographic” because “that is all the advertiser pays for.” *Id.* at 1333:12-14. *See also* Tr. at 554:2-6 (Goldhill testified that GSN would get “no credit” if it were to “over-deliver” the target demographic; for example, “if I sold you 100,000 women 25 to 54, and we delivered 110,000 women, you don’t pay me any more.”).

³⁷⁰ Tr. at 1208:15-22.

³⁷¹ *Id.* at 731:11-16 (at the time of retiering, Zaccario testified that the demographic category women 25-54 accounted for “[t]hirty-nine-and-a-half percent” of GSN’s upfront advertising sales”). Zaccario explained that upfront advertising refers to the “auction-type marketplace when . . . advertisers buy advertising in advance of the next year.” *Id.* at 728:23-25. Zaccario also testified that historically the demographic category women 25-54 has been the largest portion of GSN’s upfront advertising sales. *See id.* at 726:18-24.

³⁷² *Id.* at 731:19-732:2.

³⁷³ *Id.* at 776:4-777:1.

³⁷⁴ *Id.* at 819:21-24 (Zaccario testified that any advertising that GSN sold based on a target demographic of men was related to the limited amount of poker programming that GSN aired at the time of the retiering).

³⁷⁵ Singer Expert Testimony at 33-34.

³⁷⁶ No evidence was presented to show similarities or disparities in target advertising of programming on the sports tier, but it most likely would not show the similarity shown between GSN and WE tv on the expanded basic tier where GSN once was competing head-to-head with Cablevision’s affiliated network for advertising accounts.

³⁷⁷ Singer Expert Testimony at 33-34 (emphasis in original).

77. An advertising analysis conducted by Cablevision's expert Lawrence Blasius established that the two networks are virtually identical. According to Blasius, two of each network's top three advertisers are the same; in descending order (based on advertising revenue), GSN's top three advertisers are {{[REDACTED]}} and WE tv's top three advertisers are {{[REDACTED]}}. ³⁷⁸ The sole unshared advertiser in each network's top three is similarly ranked—i.e., {{[REDACTED]}} is GSN's eleventh largest advertiser, and {{[REDACTED]}} is WE tv's twelfth largest advertiser. ³⁷⁹

3. Business Reasons for Retiering Are Pretextual

78. Cablevision contends that it executed the retiering decision on perceived higher programming costs. Its move of GSN to the premium sports tier was believed justified based on a "saved {{[REDACTED]}} in annual license fees by retiering GSN." ³⁸⁰ Cablevision even contends that its retiering conduct "added another {{[REDACTED]}} subscribers to the Sports & Entertainment tier" ³⁸¹—a tier which immediately before retiering only had approximately {{[REDACTED]}} subscribers. ³⁸² Ironically, Cablevision also asserts that it retiered GSN to the premium sports tier because Bickham had concluded that "GSN was a poor performer on Cablevision" and thought "GSN did not appeal to most Cablevision subscribers." ³⁸³ In sum, Cablevision claims without any reservation that because it "saved {{[REDACTED]}} in license fees, earned substantial revenues from new Sports & Entertainment tier subscribers, and saw no meaningful increase in customer churn, the weight of the evidence supports the conclusion that Cablevision made a profitable decision." ³⁸⁴ True perhaps, but Cablevision omits the damage done to GSN by its retiering strategy, which must be examined.

79. Integrated cable distributors profiting from discriminatory conduct lies at the heart of the anti-discriminatory scheme of Congress and the Commission. If discriminating against non-affiliated networks were not commercially beneficial to integrated cable distributors, then section 616 of the Act and section 76.1301(c) of the Commission's rules would be useless and unnecessary. ³⁸⁵ And it is duly noted that section 616 of the Act and section 76.1301(c) of the Commission's rules also protect legitimate business practices common to a competitive marketplace against unfounded claims of discrimination. ³⁸⁶ Here, however, the preponderance of evidence shows that there was nothing common or competitive about Cablevision's discriminatory retiering. Goldhill testified that he "never heard of another established cable network being dropped or retiered" as it occurred when Cablevision moved GSN from

³⁷⁸ CV Exh. 228—Direct Testimony of Lawrence Blasius at 28.

³⁷⁹ *Ibid.*

³⁸⁰ Cablevision Br. at 18.

³⁸¹ *Id.* at 20.

³⁸² *Supra* note 83.

³⁸³ Cablevision Br. at 19.

³⁸⁴ *Id.* at 20.

³⁸⁵ *See infra* para. 96.

³⁸⁶ *See infra* para. 97. It is indisputable that Cablevision had the right to drop out-of-contract GSN from its lineup altogether so long as Cablevision exercised that discretion in a manner that did not discriminate on the basis of GSN's non-affiliation with Cablevision. Cablevision thus argues that its retiering decision was merely the outcome of its evaluation of the "pros and cons of continued GSN carriage." Cablevision Br. at 18. In addition, Cablevision's retiering conduct left GSN better off (at least in terms of distribution) than GSN would have been if Cablevision had dropped GSN from its lineup. But the mere existence of non-discriminatory business reasons for dropping GSN, or even for retiering GSN to the premium sports tier, does not absolve Cablevision for discriminating against GSN on the basis of its non-affiliation with Cablevision, particularly where, as here, such discriminatory conduct unreasonably restrained GSN's ability to compete fairly.

expanded basic to a premium sports tier.³⁸⁷ No witness' testimony nor any documentary evidence disputes or is inconsistent with or contradicts Goldhill's testimony. The uncommonness of the unprecedented GSN retiering is magnified by Cablevision's rejection of its own cost-savings proposal that would have retiered four non-affiliated networks (including GSN) as a unit from the expanded basic tier to the premium sports tier.³⁸⁸ When Bickham (approved by Rutledge) retiered GSN, Cablevision's own personnel cried foul and urged that they needed "to get some more 'entertainment' into that thing, pronto to validate" GSN's retiering.³⁸⁹ But, as discussed in paragraph 85 below, Cablevision made no such expansion of the premium sports tier.

80. Additionally and diametrically contrary to Cablevision's assertion that GSN was retiered because it was a weak and unpopular network, the preponderance of evidence proves beyond any equivocation that GSN was a uniquely popular network that was highly valued by and attracted the loyalty of Cablevision subscribers.³⁹⁰ The evidence also convinces that contrary to Cablevision's assertion, GSN was not retiered to premium sports to save programming costs. Cost savings was a fortunate effect but not the reason for GSN's retiering. For as the preponderance of evidence proves, although there was a significant increase in subscribership to the premium sports tier as a result of GSN's retiering, this too was a serendipitous effect of and certainly not the main motive for Cablevision's retiering of GSN.³⁹¹

81. Rather, the weight of the evidence clearly shows that Bickham *first* targeted GSN for elimination from Cablevision's lineup for reasons unrelated to cost savings. *Then* Bickham instructed Montemagno to come up with necessary business reasons to support his intention.³⁹² But after Montemagno pointed out the negatives that would result from dropping GSN, Bickham took no alternative action against GSN, even rejecting a retiering of GSN that would have yielded the majority of the programming savings sought by Cablevision.³⁹³

82. When Bickham decided to retier GSN, he did so not to save programming costs. It was because he believed erroneously that GSN could be retiered "without having a negative impact on the business."³⁹⁴ On top of that, Bickham was quite confident that Cablevision could squeeze additional revenue from loyal GSN viewers who would be willing to pay a premium to continue their access to GSN's programming.³⁹⁵ Cablevision however told CEO Dolan a different story in informing him of the

³⁸⁷ Tr. at 217:17-19. *Cf.* Martin Testimony at 197-201 (Martin testified that in the normal course of business "[e]very distributor expresses concern about price about every network" such that "price is part of the negotiation" in which "distributors threaten drops all the time" but not retiering; the sole instance she recalled where WE tv was dropped to a lower penetrated tier "as a part of negotiation," the retiering was reversed after a few months).

³⁸⁸ *See supra* para. 33.

³⁸⁹ GSN Exh. 127.

³⁹⁰ *Supra* para. 29. At the time of retiering, out of the 56 networks that Cablevision distributed on the expanded basic tier based on STB data, GSN ranked 45th and, of the affiliated networks, AMC ranked 8th, WE tv ranked 16th, News 12 ranked 35th, FUSE ranked 43rd, MSG ranked 47th, MSG Plus ranked 48th, and MSG Varsity ranked 50th; and based on Nielsen data, GSN ranked 41st, AMC ranked 29th, WE tv ranked 38th, FUSE ranked 66th, MSG ranked 54th, MSG Plus ranked 63rd, and News 12 and MSG Varsity had no rank. CV Exh. 154 at 5; *see also supra* para. 37 and note 169.

³⁹¹ *See supra* paras. 47-48

³⁹² *See supra* para. 27 and note 114 (Montemagno testified that Bickham "asked me to prepare a recommendation to support his decision" to drop GSN.).

³⁹³ *See supra* para. 30 (Cablevision's annual savings would have been approximately { [REDACTED] } for dropping GSN, and approximately { [REDACTED] } under the alternate proposal to retier GSN to the Silver tier).

³⁹⁴ *Supra* para. 39.

³⁹⁵ *Ibid.*

reason for GSN's retiering. Dolan testified that the retiering decision was made because GSN was demanding a higher license fee.³⁹⁶ But as the evidence clearly shows, no such demand had been made by GSN. Two years prior to the retiering, Cablevision made clear that GSN (which was out of contract) should be "happy" with the {{[REDACTED]}} license fee that Cablevision was paying and would continue to pay for the right to distribute GSN on its expanded basic tier.³⁹⁷

83. Undisputed evidence also proves that Cablevision's one-sided retiering decision from a superior bargaining position was "final" and non-negotiable even before it was communicated to GSN since Cablevision had already determined that it would not change its decision even if it could have distributed GSN broadly for "{{[REDACTED]}}",³⁹⁸ as Cablevision distributed broadly its own affiliated "{{[REDACTED]}}" networks.³⁹⁹ Clearly GSN's low, longstanding static license fee was a given, particularly with an expired contract, and had nothing to do with the retiering decision.⁴⁰⁰ However, the retiering of GSN reduced distribution of GSN's programming dramatically from {{[REDACTED]}} to approximately {{[REDACTED]}} subscribers.⁴⁰¹ In sum, Cablevision thereby unilaterally converted GSN to the essentially "free service" that Cablevision proposed as the only option for restoring GSN to broad carriage on its cable system.⁴⁰²

4. Motive To Discriminate

84. Cablevision asserts that it "had no motive to discriminate against GSN because WE tv neither viewed GSN as a competitor nor included it as a part of its competitive set."⁴⁰³ To bolster its assertion, Cablevision notes that at the time of retiering it "agreed to launch OWN, a women's network

³⁹⁶ *Supra* note 177 (Dolan testified that he was told that the retiering decision was made because "GSN wanted a significant rate increase").

³⁹⁷ *See supra* para. 28.

³⁹⁸ *Supra* para. 40.

³⁹⁹ Cablevision distributed affiliated networks MSG Varsity and Wedding Central on broadly penetrated tiers. *See supra* para. 19 and note 80 (Cablevision distributed MSG Varsity on the expanded basic tier, which was {{[REDACTED]}} percent penetrated, and distributed Wedding Central on the digital basic tier, which was {{[REDACTED]}} percent penetrated).

⁴⁰⁰ *See supra* para. 24. At the same time it retiered GSN, Cablevision entered into a new carriage agreement with WE tv at a significantly higher license rate than the {{[REDACTED]}} rate that Cablevision had been paying and continues to pay distribute GSN's programming to its subscribers. *See* GSN Exh. 202 at Exhibit A (the Cablevision-WE tv carriage agreement effective January 1, 2011, provides that the monthly per subscriber license fee will be: {{[REDACTED]}} in 2011; {{[REDACTED]}} in 2012; {{[REDACTED]}} in 2013; {{[REDACTED]}} in 2014; and {{[REDACTED]}} in 2015).

⁴⁰¹ *See infra* note 412 (by retiering GSN, Cablevision slashed the annual cost of distributing GSN's programming from {{[REDACTED]}} to less than {{[REDACTED]}}).

⁴⁰² *See supra* para. 44 (Montemagno testified that he advised GSN that Cablevision had no interest in changing the retiering decision "unless [GSN] was a free – it was directionally a free service"). There is no evidence in the record that would support finding that Cablevision's post-retiering carriage proposal to GSN was reasonable, or even sincere. *See supra* note 181. For example, although Montemagno testified that "it is not uncommon for programming networks to agree to free deals, especially when they are first launched and building support from advertisers," Montemagno Testimony at 33, Cablevision itself describes GSN as "a fully-distributed, established national network." Cablevision Br. at 23. In addition, there is no evidence in the record that even suggests that a network as highly valued by Cablevision subscribers as GSN—which Cablevision's own evidence proves—would agree to a "free" deal that "would have essentially put [GSN] out of business." *Supra* note 207. Even in reversing its decision to drop {{[REDACTED]}}, Cablevision entered into a new carriage agreement that maintained {{[REDACTED]}} carriage on the expanded basic tier at a reduced—but not a "free"—license rate. *See supra* para. 35. The preponderance of evidence however does not prove that Cablevision's "free" carriage proposal was made in bad faith as GSN contends. *See supra* note 207 (on cross-examination, Montemagno provided credible testimony for his erroneous belief that Cablevision's carriage proposal was reasonable).

⁴⁰³ Cablevision Br. at 18.

that WE tv did consider a competitive threat.”⁴⁰⁴ But this fact is not relevant. When viewed as a whole, the record suggests that Cablevision simply swapped carriage of one non-affiliated women’s network for another because Cablevision only agreed to launch OWN after it decided to retier GSN to the premium sports tier.⁴⁰⁵ Moreover, there is no evidence in the record that Cablevision launched OWN on the expanded basic tier to be in direct competition with WE tv as had been the case with GSN.

85. There also is no evidence in the record that supports Montemagno’s claim that GSN was retiered because “Cablevision was considering expanding the Sports Pak to include additional entertainment and lifestyle channels.”⁴⁰⁶ Record evidence proves instead that Cablevision never expanded its premium sports tier by adding any entertainment network to that tier except for GSN.⁴⁰⁷ Thus, any consideration Cablevision may have given to the creation of “other subject matter oriented tiers” had nothing to do with its decision to retier GSN to the premium sports tier.⁴⁰⁸

86. Based on the preponderance of evidence, the Presiding Judge finds that none of the otherwise possible business reasons that Cablevision has offered (discussed in paragraphs 78-83) changes the fact that Cablevision discriminated against GSN on the basis of GSN’s non-affiliation with Cablevision. Those so-called business reasons serve only as pretextual cover for engaging in discriminatory conduct, or for attempting to cover it up after the fact. In light of the foregoing finding of intentional discrimination, the Presiding Judge need not reach the alternate question of whether Cablevision experienced a net benefit (or a net loss) as a result of retiering GSN from the expanded basic tier to the premium sports tier.⁴⁰⁹

D. Cablevision’s Discriminatory Conduct Unreasonably Restrained GSN’s Ability To Compete Fairly

87. At hearing, Zaccario testified that as an advertising-supported cable network, there are “two ways GSN makes money: through advertising sales and distribution sales.”⁴¹⁰ The preponderance of evidence proves that Cablevision’s discriminatory retiering conduct significantly and negatively impacted GSN’s advertising and license fee revenue and unreasonably restrained GSN’s ability to compete fairly against other female-targeted networks, including similarly-situated WE tv.⁴¹¹

⁴⁰⁴ *Ibid.*; Montemagno Testimony at 23 (Montemagno testified that Cablevision made the “decision in December 2010, to launch another unaffiliated women’s network, OWN (the Oprah Winfrey Network).”). *See also* Brooks Expert Testimony at 9 (OWN “has focused primarily on documentary programming emphasizing self-improvement and spirituality for women”).

⁴⁰⁵ *See supra* note 155.

⁴⁰⁶ Montemagno Testimony at 23.

⁴⁰⁷ *See supra* para. 20. Instead of moving any other entertainment network to the premium sports tier, the record shows that Cablevision expanded the Gold tier, its premium entertainment tier, by including the networks Cablevision distributed separately as the premium sports tier. *See* CV Exh. 316 at 1; *supra* para. 49 and note 242. The record also shows that after GSN’s retiering, Cablevision launched additional sports networks including NFL Redzone on the premium sports tier. *See* CV Exh. 316 at 1.

⁴⁰⁸ *See* Montemagno Testimony at 23.

⁴⁰⁹ *See Tennis Channel*, 717 F.3d at 987 (there is reliable proof that “an otherwise valid business consideration is . . . merely pretextual cover for some deeper discriminatory purpose”). *See also Game Show Network, LLC v. Cablevision Systems Corp.*, MB Docket No. 12-122, Post-Trial Brief of Game Show Network, LLC (filed Sept. 30, 2015) (GSN Br.) at 20-22; Cablevision Br. at 20-22.

⁴¹⁰ Tr. at 733:19-21.

⁴¹¹ As supported by the preponderance of uncontested evidence, the Presiding Judge finds that, as of time of hearing in 2015, GSN already had lost { [REDACTED] } in license fee and advertising revenue as a direct result of Cablevision’s discriminatory retiering conduct. *See* GSN Br. at 23.

1. Loss of License Fee Revenue

88. Cablevision paid, and GSN accepted, {{ [REDACTED] }} per subscriber per month to distribute GSN's programming on its cable systems regardless of tier. There is no dispute that GSN suffered a net loss in annual license fee revenue of approximately {{ [REDACTED] }} as a direct result of Cablevision retiering it from the expanded basic tier with {{ [REDACTED] }} subscribers to the premium sports tier with roughly {{ [REDACTED] }} subscribers.⁴¹²

89. Also, at the time of retiering, GSN's programming was distributed to 73.5 million subscribers nationwide. The loss of {{ [REDACTED] }} expanded basic tier subscribers represents a loss to GSN of 96 percent of Cablevision subscribers and nearly 4 percent of all subscribers that would have had access to GSN's programming in the absence of Cablevision's discriminatory retiering conduct.

2. Loss of Advertising Revenue

90. As a result of Cablevision's discriminatory retiering conduct, GSN experienced a decline in the sought-after New York DMA of 60 percent in household viewership, as well as a decline of 80-90 percent decline in targeted female viewership.⁴¹³ Zaccario testified that GSN lost a minimum of “{{ [REDACTED] }}” annually in advertising revenue as a direct result of Cablevision's discriminatory retiering conduct.⁴¹⁴ Zaccario further testified that at the time of retiering, GSN lost approximately {{ [REDACTED] }} in advertising revenue for each of the {{ [REDACTED] }} expanded tier subscribers who had lost access to GSN's programming.⁴¹⁵ Since the retiering, GSN's annual advertising loss has increased to {{ [REDACTED] }} per each of those subscribers.⁴¹⁶ Zaccario testified that the advertising revenue loss resulting directly from Cablevision's discriminatory retiering conduct was currently valued at {{ [REDACTED] }} annually.⁴¹⁷ The loss of advertising revenue that is directly attributable to Cablevision's discriminatory retiering conduct represents an annual loss of 3 percent of GSN's total advertising revenue.⁴¹⁸

⁴¹² See *supra* paras. 17-18. By retiering GSN from the expanded basic tier to the premium sports tier, Cablevision initially slashed the annual license fee to distribute GSN's programming from approximately {{ [REDACTED] }} to less than {{ [REDACTED] }}. CV Exh. 147 (showing annual license fees in December 2010 of “{{ [REDACTED] }}” and “{{ [REDACTED] }}” for GSN carriage on the expanded basic tier and the premium sports tier, respectively).

⁴¹³ See Brooks Expert Testimony at 73-74 (Brooks also testified that WE tv and other women's networks experienced gains in viewership as a result of Cablevision's discriminatory retiering of GSN).

⁴¹⁴ Tr. at 842:16-24. See also GSN Exh. 99 (upon receiving notice of Cablevision's retiering decision, Goldhill calculated that GSN would lose “approximately {{ [REDACTED] }} a year” just in licensing fees and advertising revenue); *supra* para. 41.

⁴¹⁵ Tr. at 740:7-8 (Zaccario testified that at the time of GSN's retiering “each subscriber was worth about {{ [REDACTED] }} . . . per year.”).

⁴¹⁶ *Id.* at 740:12-18; see also *id.* at 843:3-7.

⁴¹⁷ *Id.* at 843:9-10.

⁴¹⁸ *Id.* at 740:21-24; see also *id.* at 842:14-844:13 (Zaccario testified that at the time of retiering, GSN's annual advertising revenue totaled {{ [REDACTED] }} and its annual loss was valued at {{ [REDACTED] }}; at the time of the hearing, GSN's annual advertising revenue totaled {{ [REDACTED] }} and its annual loss was valued at {{ [REDACTED] }}). GSN argues that it was also harmed because Cablevision's discriminatory retiering conduct occurred in the New York DMA, which is the epicenter of national advertising sales. See GSN Br. at 24 (beyond its quantifiable revenue losses, “GSN has also suffered . . . from the unique nature of the Cablevision market, which is home to a large number of top advertising agencies and media buyers”); see also Brooks Expert Testimony at 74-75; *cf.* Martin Testimony at 301-04. Although the preponderance of evidence proves the unique importance of carriage in the New York DMA with respect to national advertising sales (a proposition that Cablevision does not dispute), the Presiding Judge is not persuaded that this fact itself is evidence of harm within the purview of section 616 of the Act and section 76.1301(c) of the Commission's rules. See Sapan Testimony at 202 (Sapan testified that although it is generally accepted in the industry that a network may increase its advertising revenue through broad distribution in the New York DMA, this proposition assumes that ad buyers “are only watching the good stuff” but they could just

(continued....)

3. Unfair Placement on Premium Sports Tier

91. GSN expert Brooks testified that “[e]xtra-cost tiers” like Cablevision’s premium sport tier “are considered the ‘Siberia’ of cable.”⁴¹⁹ Moreover, it is crucially “important to the long-term distribution strategies of most networks” to be “perceived as a ‘basic network’ (versus a ‘tiered’ network)” because “networks that are viewed as ‘tiered’ rather than ‘basic’ are not favored by advertisers.”⁴²⁰ Brooks’s testimony makes sense since advertisers want to reach as many viewers as possible in order to successfully market their products. No Cablevision witness—fact or expert—disputed Brooks’s testimony. In fact, WE tv President Martin testified that as an ad-supported network, WE tv’s commercial success was dependent on how broadly it was distributed by MVPDs because “[m]ore distribution” leads to “more ad revenue.”⁴²¹ Martin also testified that a decline in viewership alone will cause a drop “[i]n ad sales.”⁴²² Because MVPDs do not operate in isolation, it is also important to an ad-supported network how it is collectively distributed. Martin testified that an adverse or positive carriage decision by even one MVPD can have a domino effect on the carriage decisions of other distributors.⁴²³

4. Anticompetitive Effect

92. GSN lost substantial advertising revenue in the reduction of its distribution by 96 percent among Cablevision subscribers, and 4 percent nationwide. In this way, the discriminatory retiering of GSN to the premium sports tier effectively “eliminate[d] the opportunity for [the] network to benefit from casual viewers (or ‘surfers’).”⁴²⁴ To have access to subscribers “who happen upon the network or who tune to it for a special event or premiere” is fundamentally important to GSN and other ad-supported networks.⁴²⁵ This permits gaining viewership that the network “can then attempt to convert them to more regular viewership by that programming and/or by promotional advertisements for other shows.”⁴²⁶

93. Cablevision’s discriminatory retiering to male-oriented viewing made it “almost impossible” for GSN to attract new viewers among Cablevision subscribers.⁴²⁷ The premium sports tier has been and is a collection of premium male-targeted networks offering men-oriented programming that consists exclusively of sports and sports-like programming.⁴²⁸ In stark contrast, GSN is, and at the time of retiering was, a basic female-targeted general entertainment network offering women-oriented programming, primarily of game show and game show-like programming.⁴²⁹ As the undisputed evidence

(Continued from previous page) _____
as easily “be watching things that cause them to think quite poorly” of a network). In any event, the Presiding Judge finds that GSN had no obligation to mitigate this purported harm by purchasing subscriptions to the premium sports tier for affected Cablevision subscribers—i.e., ad buyers who lost access to GSN’s programming as a result of the retiering—as was suggested by Cablevision at hearing. *See* Tr. at 756:7-757:5.

⁴¹⁹ Brooks Expert Testimony at 71.

⁴²⁰ *Id.* at 72.

⁴²¹ Martin Testimony at 230. Martin also testified that the “most important thing” for an ad-supported network “is the amount of viewership” because “[a]dvertisers don’t look at levels of carriage, tiers, things like that, they are really [only] looking for eyeballs.” *Id.* at 228.

⁴²² *Id.* at 218.

⁴²³ *Id.* at 215-20.

⁴²⁴ Brooks Expert Testimony at 72.

⁴²⁵ *Ibid.*

⁴²⁶ *Ibid.*

⁴²⁷ *Ibid.*

⁴²⁸ *See supra* paras. 18, 20.

⁴²⁹ *See supra* paras. 10, 51, 59-62.

makes clear, GSN has nothing in common with the networks that Cablevision distributes on the premium sports tier.⁴³⁰ Consequently, Cablevision premium sports tier subscribers almost exclusively “will be males looking for additional sports programming” and not the women to whom GSN’s programming is targeted for new viewers and new business opportunities, and on which GSN’s advertising sales are based.⁴³¹

III. CONCLUSIONS OF LAW

A. Statutory and Regulatory Background

94. Section 616 of the Act, supplemented by the Cable Television Consumer Protection and Competition Act of 1992 (1992 Cable Act),⁴³² directs the Commission to promulgate regulations which “prevent a multichannel video programming distributor from engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors.”⁴³³

95. The Commission adopted section 76.1301(c) of its rules, which closely tracks the operative language of section 616 of the Act, that: “[n]o multichannel video programming distributor shall engage in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or non-affiliation of vendors in the selection, terms, or conditions of video programming provided by such vendors.”⁴³⁴

96. In 1992, Congress foresaw and was concerned that “vertically integrated cable operators have the incentive and ability to favor affiliated programmers over unaffiliated programmers with respect to granting carriage on their systems.”⁴³⁵ Congress specifically found that cable operators in certain instances could abuse their market power to the detriment of unaffiliated programmers.⁴³⁶ Clearly, Section 616 of the Act and section 76.1301(c) of the Commission’s rules were promulgated to safeguard programming vendors against discrimination that arises from their non-affiliation with cable operators. Thus, the disparate relationship of video programmer GSN to cable distributor Cablevision is a concern of Congress.

97. Congress also wanted to ensure that its legislation barring discrimination did not have an unintended consequence of “restraining the amount of multichannel programming available by precluding legitimate business practices common to a competitive marketplace.”⁴³⁷ Indeed, one principle advanced

⁴³⁰ See *supra* paras. 45-49. As Montemagno confirmed at hearing, GSN is the only network on the premium sports tier that is only entertainment and not sports. Tr. at 1614:16-19.

⁴³¹ See Brooks Expert Testimony at 72-73.

⁴³² Pub. L. No. 102-385, 106 Stat. 1460 (1992).

⁴³³ 47 U.S.C. § 536(a)(3).

⁴³⁴ 47 CFR § 76.1301(c). Cablevision is a multichannel video programming distributor as defined by section 602 of the Act, 47 U.S.C. § 522(13), and section 76.1300(d) of the Commission’s rules, 47 CFR § 76.1300(d). GSN is a video programming vendor as defined by section 616 of the Act, 47 U.S.C. § 536(b), and section 76.1300(e) of the Commission’s rules, 47 CFR § 76.1300(e).

⁴³⁵ *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992—Development of Competition and Diversity in Video Programming Distribution and Carriage*, Second Report and Order, 9 FCC Rcd 2642, 2643 para. 2 (1993) (*Second Report*), *recon. granted in part*, 9 FCC Rcd 4415 (1994) (*Second Report Reconsideration*). See also S. Rep. No. 102-92 at 25 (Senate Report).

⁴³⁶ Senate Report at 24.

⁴³⁷ *Second Report*, 9 FCC Rcd at 2643, para. 1. See *id.* at 2648, para. 15 (internal quotation marks omitted).

by the 1992 Cable Act, of which section 616 is a part, is to “rely on the marketplace, to the maximum extent feasible, to achieve greater availability of the relevant programming,” a legislative objective that the Commission took into account in adopting section 76.1301(c) of its rules.⁴³⁸ In this way, Sections 616 of the Act and 76.1301(c) of the Commission’s rules “strike a balance that not only proscribe[s] the behavior prohibited by the specific language of the statute, but also preserve[s] the ability of affected parties to engage in legitimate negotiations.”⁴³⁹ Such a negotiation occurred here. GSN had an expired carriage agreement for an extended time but, to GSN’s detriment, Cablevision would not realistically negotiate a new one.

98. To prevail here, GSN, as an unaffiliated video programming vendor, must prove by a preponderance of evidence two discrete elements in order to establish that Cablevision, as a video programming distributor, violated sections 616 of the Act and 76.1301(c) of the Commission’s rules. So GSN is required to prove that Cablevision discriminated against it on the basis of affiliation or non-affiliation, and also prove that the effect of such discrimination unreasonably restrained GSN’s ability to compete fairly.⁴⁴⁰

B. Proven Discrimination on the Basis of Non-Affiliation

99. In order to prove discrimination on the basis of non-affiliation as proscribed by section 616 of the Act and section 76.1301(c) of the Commission’s rules, GSN must show that its non-affiliation with Cablevision “actually played a role in the process and had a determinative influence on the outcome.”⁴⁴¹ GSN can make that showing by (1) direct evidence such as statements showing a discriminatory intent, or (2) circumstantial evidence such as showing “uneven treatment of similarly situated entities.”⁴⁴² Based on the preponderance of evidence, the Presiding Judge concludes that GSN has met its burden of proving discrimination by direct evidence and by circumstantial evidence.

1. Direct Evidence of Discrimination

100. GSN presented “two lines of direct evidence” to show that Cablevision discriminated on the basis of non-affiliation: (1) Cablevision’s admissions and other proof as to how Cablevision treats GSN and its affiliated networks differently in the terms and conditions of carriage; and (2) GSN’s proof that Cablevision later conditioned reasonable carriage for GSN on its ability to extract value from one of GSN’s parent companies for Cablevision’s affiliated network.⁴⁴³ The Presiding Judge concludes that GSN proved discrimination under “admissions and proof” but not under “uneven treatment” presented in its second line of direct evidence.⁴⁴⁴

⁴³⁸ *Id.* at 2648, para. 15, quoting 1992 Cable Act, § 2(b)(2) (internal quotation marks and footnote omitted). See *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992—Development of Competition and Diversity in Video Programming Distribution and Carriage*, First Report and Order, 8 FCC Rcd 3359, 3402, para. 145 (1993).

⁴³⁹ *Second Report Reconsideration*, 9 FCC Rcd at 4416, para. 7. See *Second Report*, 9 FCC Rcd at 2648-49, para. 15.

⁴⁴⁰ 47 U.S.C. § 536(a)(3); 47 CFR § 76.1301(c).

⁴⁴¹ *WealthTV*, 24 FCC Rcd 12967 at 12997-98, para. 63 (internal brackets omitted) (quoting *Hazan Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993)).

⁴⁴² See *id.* at 12998, para. 63 (citing *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98-100 (2003)).

⁴⁴³ GSN Br. at 4.

⁴⁴⁴ The Presiding Judge also concludes that Cablevision’s admissions—for example, that there was nothing GSN could do to reverse the retiering decision (*supra* paras. 40, 83)—are statements showing a discriminatory intent. See *WealthTV*, 24 FCC Rcd at 12998, para. 63.

a. GSN Was Retiered on the Basis of Non-Affiliation

101. GSN has proven through direct evidence that the retiering of GSN from the expanded basic tier to the premium sports tier was based on GSN's non-affiliation with Cablevision. It is found that Cablevision, without any valid business reason, tagged GSN for retiering because GSN had an expired carriage agreement with Cablevision and Cablevision refused to negotiate a new contract.⁴⁴⁵ GSN proved that Cablevision, in its retiering decision, considered retiering only non-affiliated networks having expired or expiring contracts. Yet no consideration was given by Cablevision to retiering any of its affiliated networks, including those that also had expired or expiring carriage agreements.⁴⁴⁶ In its explanation, Cablevision claimed to be powerless to retier any of its affiliated networks—with or without expiring carriage agreements.⁴⁴⁷ Such an assertion is not credible because it is contradicted by substantial evidence. It was evident that Thomas Rutledge, Cablevision's Chief Operating Officer, was the final arbiter of disputes or differences between Cablevision's programming side and its distribution side.⁴⁴⁸ Contemporaneous documentary evidence proves by a preponderance that contractual negotiations between Cablevision's programming and distribution sides were not conducted at arms-length but at the direction and under the control of Rutledge.⁴⁴⁹

b. The "Must-Have" Programming Disconnect

102. Cablevision erroneously claimed to have retiered GSN because GSN did not offer "must-have" programming.⁴⁵⁰ For Cablevision, "must-have programming" is programming that would cause subscribers to "call and disconnect" if they lost access to it.⁴⁵¹ Cablevision represents that such programming is limited to programming found on broadcast and sports networks.⁴⁵² GSN's programming did not meet Cablevision's concept of "must-have" programming. Yet a historically high number of Cablevision subscribers called to complain of GSN's retiering.⁴⁵³ Incredibly but actually, more than 5000 Cablevision subscribers disconnected their cable service upon losing access to GSN by Cablevision's retiering.⁴⁵⁴ Contrariwise, Cablevision did not even consider retiering any of its seven affiliated networks distributed on the expanded basic tier. As with GSN, most of those networks, according to Cablevision's own assessment, did not offer must-have programming. It is again noted that neither AMC, Fuse, News

⁴⁴⁵ *Supra* para. 24,28.

⁴⁴⁶ *Supra* notes 148, 152 and 155.

⁴⁴⁷ See Tr. at 1677:8-1678:1 (Montemagno testified that the contracts that Cablevision entered into with its affiliated networks did not allow Cablevision to retier them to the premium sports tier.).

⁴⁴⁸ *Supra* para. 14; see also *infra* para. 108 (with respect to its affiliated networks, Rutledge also had absolute authority to waive contractual provisions like MFN clauses).

⁴⁴⁹ See CV Exh. 121E at 1 (regarding the renewal of expiring contracts for affiliated Rainbow networks AMC, IFC, and Sundance, Cablevision's programming side reported that it had "[h]ad [a] conversation with Rainbow upon receiving initial direction from COO" and that "Rainbow indicated that they wanted to also check with COO for direction as well"); see also CV Exh. 315 (3/9/11 email from Broussard to Sapan regarding a modification of licensing rates for AMC and WE tv in which Broussard states that Rainbow "would need to raise with Rutledge" and, with respect to a different Cablevision-Rainbow carriage matter, Broussard stated that Cablevision "agreed to continue discussing but indicated they are not prepared to lock it down today without being directed to do so"—presumably by Rutledge).

⁴⁵⁰ *Supra* para. 39.

⁴⁵¹ *Supra* note 175.

⁴⁵² *Supra* para. 25.

⁴⁵³ *Supra* paras. 45.

⁴⁵⁴ *Supra* paras. 45-48.

12, nor WE tv is a broadcast network and do not offer sports programming.⁴⁵⁵ Nor did Cablevision consider retiering any affiliated sports network—MSG, MSG Plus, and MSG Varsity—each network went outranked by GSN on the expanded basic tier.⁴⁵⁶ And there is no evidence that any of the seven affiliated networks distributed on the expanded basic tier had near the loyal viewership of Cablevision’s subscribers that GSN did.⁴⁵⁷

103. Dismissing the favorability that viewers had for GSN, Cablevision represents that GSN was not retiered on the basis of non-affiliation but because “GSN was ‘a very weak network’” that could be retiered without losing subscribers,⁴⁵⁸ a proposition that is flatly contradicted by substantial evidence. Cablevision’s own evidence—its set-top box data—proves that GSN was as popular a network as any network distributed on the expanded basic tier.⁴⁵⁹ This evidence also proves that GSN was more popular among expanded basic tier subscribers at the time of the retiering⁴⁶⁰ than it had been in July 2010, when Cablevision discussed and rejected the idea of dropping GSN.⁴⁶¹ Finally, GSN has proven that Cablevision lost subscribers to its detriment as a result of its retiering of GSN to the premium sports tier.

104. Cablevision represented that GSN presented inferior programming. Yet counterintuitively, Cablevision contends that GSN had “added another {{[REDACTED]}} subscribers to the Sports & Entertainment tier on which GSN was now carried, resulting in {{[REDACTED]}} of dollars in additional profits [for Cablevision] due to the retiering.”⁴⁶² Programming expert Brooks testified that cable distributors “assert that they want to put a popular channel on a tier in order to drive viewers to that tier.”⁴⁶³ Brooks also testified that retiering a popular channel “only works if the popular channel so placed is appropriate to the tier.”⁴⁶⁴ For example, he posited that “placing ESPN in the ‘Sports & Entertainment Pak’ might drive subscribership to the tier,” but retiering “GSN amid channels with which it has nothing in common will not accomplish that goal.”⁴⁶⁵ So the decision of Cablevision was not to retier GSN for the purpose of increasing subscribership to its premium sports tier. Cablevision retiered because GSN was erroneously thought to be “a very weak network.”⁴⁶⁶ Cablevision realized “additional profits” from subscribers who “had to have Game Show Network” programming and paid an additional \$6.95 per month to retain access to GSN programming.⁴⁶⁷ Cablevision added approximately {{[REDACTED]}} disgruntled GSN expanded basic tier viewers to the premium sports tier (which had approximately

⁴⁵⁵ See *supra* paras. 15, 19; see also CV Exh. 816 at 54, 512 (the Cable Directory describes AMC as a “cable movie network” and Fuse as a “contemporary music cable network”) (capitalization omitted).

⁴⁵⁶ *Supra* para. 37.

⁴⁵⁷ *Ibid.*

⁴⁵⁸ Cablevision Br. at 19 (*quoting* Bickham Testimony at 60).

⁴⁵⁹ See *supra* note 128 (Cablevision only distributed highly ranking networks on the expanded basic tier).

⁴⁶⁰ *Supra* paras. 29, 37 (in July 2010, GSN ranked 49th out of 52 networks that Cablevision distributed on the expanded basic tier; in November 2010, GSN ranked 45th out of 56 networks that Cablevision then distributed on the expanded basic tier).

⁴⁶¹ *Supra* para. 29; see also *supra* para. 30 (as an alternative to dropping GSN, Cablevision also considered and decided against retiering GSN to the Silver tier).

⁴⁶² Cablevision Br. at 20.

⁴⁶³ Brooks Expert Testimony at 73 n.165.

⁴⁶⁴ *Ibid.*

⁴⁶⁵ *Ibid.*

⁴⁶⁶ Cablevision Br. at 19 (*quoting* Bickham Testimony at 60). Bickham had substantially miscalculated the worth of GSN, and Bickham failed to later correct his error. See *supra* paras. 45-49.

⁴⁶⁷ *Supra* para. 39 (*quoting* Bickham Testimony at 70).

{{ [REDACTED] }} subscribers⁴⁶⁸) by providing them with a six-month free subscription. Once the promotion ended, approximately {{ [REDACTED] }} GSN viewers became paid subscribers to the premium sports tier.⁴⁶⁹ Clearly, GSN possessed the quality of “must-have television” that Cablevision set for distribution on the expanded basic tier.⁴⁷⁰ Yet while ignoring its policy, with the retiering, both Cablevision and GSN experienced a measured net loss of approximately 5,000 viewers, and possibly more. Also, to its detriment, Cablevision lost the valued goodwill of multiple viewers, some of whom had to be virtually “bribed” to remain paying viewers, at least for six months.

c. Cablevision Lacked a Legitimate Business Reason

105. GSN met its burden of proof by showing that Cablevision did not retier GSN, the out-of-contract, unaffiliated network for “legitimate business reasons.”⁴⁷¹ Cablevision asserts that the overarching reason for its decision to retier GSN to the premium sports tier was to trim only one-quarter of 1 percent or {{ [REDACTED] }} from its programming budget⁴⁷² that exceeded {{ [REDACTED] }}.⁴⁷³ The evidence presented by both parties clearly shows that while Cablevision distributed more than 500 networks,⁴⁷⁴ only 30 networks, including affiliates MSG, MSG Plus, and News 12,⁴⁷⁵ accounted for a formidable 81 percent of Cablevision’s troublesome 2011 programming costs.⁴⁷⁶ In contrast, carriage of GSN on the expanded basic tier accounted for only one-quarter of 1 percent of the 2011 programming budget.⁴⁷⁷ In explanation, Cablevision asserted that in 2011, it “faced substantial cost pressures from retransmission consent fees, skyrocketing rights fees for important sports programming, and programming network bundling practices.”⁴⁷⁸ But these are costs having nothing to do with the continued carriage of GSN on the expanded basic tier. Nor did these costs account for most of an {{ [REDACTED] }} increase in programming costs that Cablevision was “trying to manage” in finalizing a trimmed down budget.⁴⁷⁹ The record shows that these increased programming costs were due to Cablevision’s non-GSN contractual obligations and increased in operating costs attributable to the total number of Cablevision’s subscribers.⁴⁸⁰

106. Cablevision also asserted that retiering GSN to the premium sports tier was the only fiscal option that “would enable [Cablevision] to save the majority of the {{ [REDACTED] }}” it sought to trim from its 2011 programming budget.⁴⁸¹ Yet Cablevision’s own evidence proved this assertion to be

⁴⁶⁸ *Supra* para. 18.

⁴⁶⁹ *Supra* paras. 47-48.

⁴⁷⁰ *Supra* para. 39 (quoting Bickham Testimony at 75); *see also* note 175.

⁴⁷¹ *See* Cablevision Br. at 17-22.

⁴⁷² *Supra* paras. 33-35, 39.

⁴⁷³ CV Exh. 136 at 2.

⁴⁷⁴ *Supra* para. 29.

⁴⁷⁵ CV Exh. 136 at 10 (for 2011, Cablevision budgeted to pay affiliates MSG and MSG Plus approximately {{ [REDACTED] }}, and News 12 approximately {{ [REDACTED] }}, for expanded basic tier distribution). Carriage of MSG and MSG Plus on the expanded basic tier accounted for the largest share of Cablevision’s 2011 programming budget. *Supra* note 153.

⁴⁷⁶ CV Exh. 136 at 10; *see also supra* para. 34.

⁴⁷⁷ *See supra* para. 32; *see also* CV Exh. 136 at 4.

⁴⁷⁸ Cablevision Br. at 18; *see also supra* para. 25.

⁴⁷⁹ *Supra* note 150 (quoting Tr. at 1657:5-21) (Montemagno redirect examination testimony)).

⁴⁸⁰ *Supra* para. 31.

⁴⁸¹ Tr. at 1658:22-25; *see also supra* para. 39.

unequivocally not true. In fact, Cablevision would have saved the majority of the amount it sought to trim from its 2011 budget by retiering GSN (or {{ [REDACTED] }}) to the Silver tier.⁴⁸² It also is an established fact that Cablevision's initial idea to drop {{ [REDACTED] }} would have trimmed the full amount of savings sought.⁴⁸³ Instead, Cablevision accepted {{ [REDACTED] }} the amount of possible savings and continued to carry {{ [REDACTED] }} on the expanded basic tier.⁴⁸⁴ And even if Cablevision had not accepted {{ [REDACTED] }} of the possible savings from dropping {{ [REDACTED] }}, Cablevision would have saved most of the {{ [REDACTED] }} it set out to save by accepting GSN's offer as an out-of-contract programmer to reduce its annual license fee by {{ [REDACTED] }}.⁴⁸⁵ In terms of its "bottom line," a reduction in annual license fees offered by GSN, plus the reduction in annual license fees of {{ [REDACTED] }}, would have yielded annual savings of approximately {{ [REDACTED] }}. That amount was significantly more than what Cablevision would have saved by retiering either non-affiliated network to the Silver tier, another option that Cablevision had also once considered in its efforts to reduce the 2011 budget.⁴⁸⁶

107. In addition, record evidence proves that unlawful discrimination on the basis of non-affiliation and not any cost savings was the actual reason that Cablevision unjustifiably retiered GSN from the expanded basic tier to the premium sports tier. In contrast to the reversal of dropping {{ [REDACTED] }}, Cablevision's decision to retier GSN was never reconsidered; rather it was "final." Not even "free" carriage of GSN could have persuaded Cablevision to reverse the GSN retiering decision.⁴⁸⁷ Cost savings could not have been Cablevision's true motive. Record evidence establishes that, with two exceptions, Cablevision would have saved substantially more by retiering just one affiliated network from the expanded basic tier to the premium sports tier.⁴⁸⁸ To illustrate, Cablevision would have saved: (1) nearly the same amount by retiering Fuse; (2) substantially more by retiering AMC, News 12, or WE tv; and (3) exponentially more by retiering MSG and MSG Plus.⁴⁸⁹ The conclusion that Cablevision would have saved substantially more by retiering WE tv was confirmed at hearing by Cablevision's own expert,

⁴⁸² While the expanded basic tier had {{ [REDACTED] }} subscribers, the Silver tier had less than {{ [REDACTED] }} subscribers. *Supra* para. 17. So with nearly {{ [REDACTED] }} fewer subscribers than the expanded basic tier, Cablevision would have saved approximately {{ [REDACTED] }} by retiering either GSN or {{ [REDACTED] }} to the Silver tier. *Supra* paras. 32, 34.

⁴⁸³ See *supra* para. 32-34. Bickham testified that there was no significance to saving {{ [REDACTED] }} in programming costs. But this was the annual savings that was possible if Cablevision were to drop GSN or as Cablevision later considered, {{ [REDACTED] }}. See *supra* paras. 27, 32 and note 116.

⁴⁸⁴ *Supra* para. 35.

⁴⁸⁵ *Supra* para. 43.

⁴⁸⁶ *Supra* para. 32. Cablevision also asserted that it may have considered reversing its retiering decision if GSN had made the "kind of proposal" that {{ [REDACTED] }} made to retain its carriage on the expanded basic tier. See Tr. at 1533:2-6. Montemagno testified that Cablevision reversed its decision to drop {{ [REDACTED] }} because Cablevision had not yet implemented the decision when it agreed instead to maintain carriage of {{ [REDACTED] }} on the expanded basic tier but at a reduced license rate. Tr. at 1531:21-1532:25. Cablevision also had not yet implemented the retiering decision by the time that GSN sought its reversal, which left open a window for negotiation in which Cablevision was not willing to participate. *Supra* paras. 41.

⁴⁸⁷ *Supra* para. 40.

⁴⁸⁸ See *supra* note 148.

⁴⁸⁹ In comparison to the {{ [REDACTED] }} Cablevision budgeted for distribution of GSN (and {{ [REDACTED] }}) on the expanded basic tier in 2011, Cablevision budgeted the following license rates for carriage of its affiliated networks on the expanded basic tier: {{ [REDACTED] }} for AMC; {{ [REDACTED] }} for Fuse; {{ [REDACTED] }} for MSG and MSG Plus; {{ [REDACTED] }} for News 12; and {{ [REDACTED] }} for WE tv. CV Exh. 136 at 10, 12. Cablevision {{ [REDACTED] }} license fee to distribute MSG Varsity on the expanded basic tier. See CV Exh. 99 at 6.

Jonathan Orszag.⁴⁹⁰ The inescapable conclusion is that if Cablevision's intention was only to save costs and not to discriminate on the basis of non-affiliation, Cablevision would have retiered an affiliated network to the premium sports tier.⁴⁹¹

d. Cablevision's Dealings with Affiliated Networks

108. GSN's first line of direct evidence shows that Cablevision engaged in discriminatory conduct by favoring its affiliated networks over non-affiliates.⁴⁹² GSN's evidence proves that: (1) Cablevision distributors lacked the discretion to "walk away" from affiliated networks as they could and did with non-affiliated networks,⁴⁹³ (2) Cablevision distributed affiliated networks more broadly than other cable distributors, and after the retiering, Cablevision narrowly distributed GSN (as well as other non-affiliated networks⁴⁹⁴) despite broad distribution of GSN by other cable distributors,⁴⁹⁵ and (3) Cablevision routinely "gave away" . . . { [REDACTED] } to affiliated networks by { [REDACTED] }.⁴⁹⁶ But none of this evidence proves that in the three scenarios, Cablevision violated section 616 of the Act and section 76.1301(c) of the Commission's rules. Beyond Cablevision's discriminatory retiering conduct,⁴⁹⁷ GSN failed to prove that any of the other Cablevision conduct had unreasonably restrained GSN's ability to compete fairly. To illustrate, GSN proved that Cablevision "gave away" considerably more money to its affiliated networks than Cablevision sought to trim from its 2011 programming budget by dropping or retiering non-affiliated networks.⁴⁹⁸ But GSN has not shown how such in-house "giveaways" restrained

⁴⁹⁰ Tr. at 2653:11-2654:20 (Orszag testified that it cost Cablevision significantly more to distribute WE tv on the expanded basic tier than to distribute GSN, and that Cablevision would have saved significantly more by retiering WE tv to the premium sports than it saved by retiering GSN). This evidence also shows that Cablevision would have saved significantly more by retiering WE tv than it would have saved by dropping either GSN or { [REDACTED] }—a cost-savings measure that Cablevision also considered but rejected. *See supra* paras. 34-35.

⁴⁹¹ The Presiding Judge also concludes that record evidence proves that the decision to retier GSN from the expanded basic tier to the premium sports tier was not a negotiation tactic that Cablevision employed in an effort to get GSN to lower its license rate. It is undisputed that Cablevision carried GSN at-will and at the existing license rate for { [REDACTED] } the retiering decision. *Supra* para. 22. It is also undisputed that, at the time of retiering, Cablevision and GSN were not in the throes of contract renewal negotiations which were suspended *two years before* Cablevision retiered GSN to the premium sports tier. *Supra* para. 24. Moreover, there is nothing in the record showing that during the four years of negotiations that preceded the suspension, Cablevision wanted GSN to lower the existing license rate of { [REDACTED] }. To the contrary, the preponderance of evidence shows that the parties' negotiations reached an impasse because GSN was seeking a higher license rate while Cablevision would not consider *any increase to the existing rate* that was unaccompanied by { [REDACTED] }. *See supra* para. 23. In addition, by the time Cablevision and GSN suspended their negotiations, Cablevision had agreed in principle to pay the existing license rate of { [REDACTED] }. *Supra* para. 22-24. The Presiding Judge also notes that in a record containing more than 1000 documents, the parties have directed his attention to a single document—GSN Exh. 127—that makes mention of any desire of Cablevision to get GSN to lower the existing license rate of { [REDACTED] }. This document, dated February 5, 2011, is an email exchange in which a Cablevision staffer responds to Montemagno that "[r]eversal" of the retiering decision would not be "terrible," particularly if GSN were to "cut [its] rate." GSN Exh. 127.

⁴⁹² *See* GSN Br. at 4-10.

⁴⁹³ *Id.* at 5.

⁴⁹⁴ *See supra* para. 20.

⁴⁹⁵ *See* GSN Br. at 6-8.

⁴⁹⁶ *Id.* at 8-10; *see also* Tr. at 1601:20-23 (Montemagno testified that Cablevision { [REDACTED] }).

⁴⁹⁷ *See supra* paras. 101-07.

⁴⁹⁸ Among other facts, GSN proved that in 2010, the same year that Cablevision sought to consider trimming its 2011 programming budget by { [REDACTED] } as a result of dropping either GSN or { [REDACTED] }, or by

(continued....)

GSN's ability to compete.⁴⁹⁹

e. DIRECTV-Wedding Central Gambit

109. GSN also has failed to prove that Cablevision engaged in discriminatory conduct by its second line of direct evidence concerning an apparent DIRECTV-Wedding Central *quid pro quo* carriage proposal.⁵⁰⁰ Recall that DIRECTV is part owner of GSN and has representation on GSN's board of directors. GSN asserts that "[c]onditioning the terms of carriage for an unaffiliated network on securing value for an affiliated network is a plain violation of Section 616" of the Act, and presumably section 76.1301(c) of the Commission's rules.⁵⁰¹ But the discriminatory conduct that is actionable in this case is not a refusal by Cablevision to distribute GSN on the expanded basic tier because DIRECTV had declined to launch Wedding Central. And there is no evidence in the record—and certainly not a preponderance of evidence—which proves that Cablevision retiered GSN for the purpose of securing DIRECTV's carriage of Wedding Central. To the contrary, the preponderance of evidence shows that the DIRECTV-Wedding Central carriage proposal came about after Cablevision's distribution side made the decision to retier GSN. The retiering decision was made without considering how it would impact Cablevision's programming side.⁵⁰² And DIRECTV contacted Rutledge, the person in charge of Cablevision and Rainbow, who then referred DIRECTV to Rainbow to see if a path existed for reversing the decision to

(Continued from previous page) _____

{{ [REDACTED] }} as result of retiering either network to the Silver tier (*supra* paras. 32, 34), Cablevision waived {{ [REDACTED] }} due to {{ [REDACTED] }} in their carriage agreements. *See* GSN Exh. 398 at 2; Tr. at 1597:18-1598:24 (Montemagno testified that the value {{ [REDACTED] }} with its affiliated networks was between {{ [REDACTED] }} and {{ [REDACTED] }} in 2010, and between {{ [REDACTED] }} and {{ [REDACTED] }} in 2009). Year after year, Rutledge {{ [REDACTED] }}. GSN Exh. 398 at 2 (stating that “{{ [REDACTED] }} COO on MFN awards due CSC” for 2005, 2006, 2007, 2008 and 2009 {{ [REDACTED] }}); *see also* Tr. at 2007:13-2009:7 (Broussard testified that Rutledge “{{ [REDACTED] }}” and so there was “{{ [REDACTED] }}”); Tr. at 1593:15-1601:10 (Montemagno testified that {{ [REDACTED] }} waived the {{ [REDACTED] }} due from {{ [REDACTED] }} in each year from 2005 through 2010). *Cf.* Sapan Testimony at 151-53 (Sapan testified that Rainbow paid a management fee to Cablevision of {{ [REDACTED] }} which amounted to {{ [REDACTED] }} and effectively canceled the {{ [REDACTED] }}).

⁴⁹⁹ Under its first line of direct evidence, GSN also argues that “Cablevision granted WE tv channel placement so favorable that WE tv [performed] far better in the Cablevision market than it did in other [cable distributors'] markets.” GSN Br. at 7. While the record contains substantial testimonial and documentary evidence showing how channel placement (and the related concept of neighborhooding) impacted WE tv and Wedding Central, GSN has not shown that Cablevision unreasonably restrained GSN's ability to compete fairly by engaging in such conduct. *See, e.g.*, Tr. at 1961:22-1978:20 (Broussard testified about the benefits to WE tv and Wedding Central of securing favorable channel placements); GSN Exh. 311 (7/26/11 internal Rainbow email in which Martin expressed alarm that “WE tv is seeing ratings declines in every single day part on every series” and she questioned whether “it [was] possible that one of our major distributors has repositioned WE tv to a less attractive channel position”).

⁵⁰⁰ *See* GSN Br. at 10-13; *see also supra* para. 42.

⁵⁰¹ GSN Br. at 10.

⁵⁰² *See supra* para. 37-39; *see also* Bickham Testimony at 205-06 (Bickham testified that the decision to retier GSN had nothing to do with Wedding Central or WE tv); Montemagno Testimony at 34-35 (Montemagno testified that he is “the lead or co-lead negotiator for Cablevision in its carriage agreements, and ha[s] been since the mid-1990s,” and as a general matter, he “negotiate[s] with a single network or a suite of networks on Cablevision's behalf, without any regard to carriage for Cablevision's affiliated network[s].”); *id.* at 35 (Montemagno further testified that “Cablevision never gave any consideration at all to WE tv or Wedding Central in the course of evaluating and ultimately re-tiering GSN” to the premium sports tier.).

retier GSN.⁵⁰³ Rather than proving that Cablevision engaged in discriminatory conduct, the DIRECTV-Wedding Central *quid pro quo* carriage proposal appears to be the kind of arms-length carriage negotiations that are permitted under section 616 of the Act and section 76.1301(c) of the Commission's rules.⁵⁰⁴

2. Circumstantial Evidence of Discrimination

110. To meet its burden of proving discrimination by circumstantial evidence, GSN need not show that it is identical in any respect to Cablevision's affiliated networks, WE tv and Wedding Central.⁵⁰⁵ But GSN has shown that it is substantially similar to WE tv and Wedding Central. So Cablevision's discriminatory intent can be inferred from its disparate treatment of GSN.⁵⁰⁶ GSN has met its burden.

111. The preponderance of evidence proves that GSN, WE tv, and Wedding Central are women's networks⁵⁰⁷ that offered similar target programming to the same target audience.⁵⁰⁸ The evidence also shows that GSN and WE tv primarily sold advertising based on the same target demographics, and in large part, to the same targeted advertisers.⁵⁰⁹ Based on such substantial and undisputed evidence, the Presiding Judge concludes that at the time of retiering GSN, WE tv, and Wedding Central were similarly situated networks.

112. As between GSN and Wedding Central, it may have made sense that Cablevision would choose GSN for retiering simply because it did not cost Cablevision anything to distribute Wedding Central broadly. An examination of the record as a whole however reveals no such economic reason for

⁵⁰³ Tr. at 1631:9-1632:15 (Montemagno testified that DIRECTV's Derek Chang contacted Rutledge about overturning the retiering GSN, and Rutledge referred him to Rainbow); *see also supra* para. 42. GSN argues that "before implementing its announced [retiering] decision, Cablevision conditioned GSN's carriage at its existing level on DIRECTV agreeing to launch Wedding Central." GSN Br. at 12 (emphasis added). GSN's argument is not supported by the preponderance of record evidence and appears to be based on speculation. For instance, Goldhill testified that Cablevision's post-retiering negotiation stance "clearly suggested to me that Cablevision had no interest in a solution that did not include a trade of carriage involving Wedding Central," and that "Cablevision's desire to advantage its affiliated networks, including to obtain a carriage commitment for Wedding Central from DIRECTV, is the only explanation for its tiering decision that is consistent with its conduct towards GSN." Goldhill Testimony at 10. Yet Goldhill unequivocally testified, which is supported by contemporaneous documentary evidence, that when DIRECTV executive Chang reached out to Rutledge in an effort to reverse the announced retiering decision, Rutledge informed Chang that he was unaware of DIRECTV's ownership of GSN. Tr. at 241:11-242:16; *see also* GSN Exh. 99 (12/14/10 email from Chang to Goldhill and Sony executives in which he states that he "[s]poke to Rutledge yesterday" and Rutledge said that the decision to retier GSN "wasn't intentional to piss off D[IREC]TV or Sony as he wasn't aware of ownership."). So it simply does not follow that Cablevision made the decision to retier GSN with the intent of extracting carriage of Wedding Central by DIRECTV.

⁵⁰⁴ *See supra* para. 97. *See also* Martin Testimony at 260-63 and Sapan Testimony at 210-16 (Martin and Sapan each testified regarding a *quid pro quo* carriage proposal between Cablevision and Comcast); Montemagno Testimony at 34 (Montemagno testified that although it is not "a common occurrence for Cablevision," in his experience "it is true that vertically integrated MVPDs do, on occasion, make deals involving carriage of affiliated networks.").

⁵⁰⁵ *See Eaton v. Indiana Dept. of Corrections*, 657 F.3d 551 (7th Cir. 2011). *Cf. Amrhein v. Health Care Service Corp.*, 546 F.3d 854, 860 (7th Cir. 2008). *See also Cordi-Allen v. Conlon*, 494 F.3d 245, 255 (1st Cir. 2007) ("the 'similarly situated' requirement . . . properly understood, does not demand identity.").

⁵⁰⁶ *See WealthTV*, 26 FCC Rcd at 8978-79, para. 22.

⁵⁰⁷ *See supra* paras. 51-58.

⁵⁰⁸ *See supra* paras. 59-68 (GSN, WE tv, and Wedding Central offered women-oriented programming that was targeted to women 25-54 and women 18-49).

⁵⁰⁹ *See supra* paras. 71-77 (two of each network's top three advertisers were the same).

choosing to retier GSN instead of WE tv. The only conclusion that can be drawn from the record as a whole is that if Cablevision's intent had not been to discriminate against GSN on the basis of its non-affiliation with Cablevision, then logic dictates that Cablevision probably would have retiered the similarly situated WE tv.⁵¹⁰ GSN has proven by a preponderance of evidence that Cablevision discriminated against GSN in favor of WE tv, on the basis of non-affiliation, in retiering GSN to the premium sports tier.

113. GSN even has proven that WE tv benefitted as a direct result of Cablevision's discriminatory retiering conduct. However, GSN has not proven that Cablevision discriminated against GSN with the intent of favoring WE tv.⁵¹¹ But because GSN already has proven that Cablevision discriminated against GSN on the basis of GSN's non-affiliation with Cablevision, there is no requirement that GSN also prove that Cablevision discriminated on the basis of WE tv's affiliation with Cablevision.

114. Cablevision's bald contention that "if the networks are not similarly situated, we can discriminate," is absolutely wrong.⁵¹² Sections 616 of the Act and 76.1301(c) of the Commission's rules prohibit Cablevision from discriminating in video programming distribution on the basis of affiliation or non-affiliation networks, period.⁵¹³ Neither section 616 of the Act nor section 76.1301(c) of the Commission's rules permits Cablevision to discriminate—in the selection, terms, or conditions of carriage on the basis of affiliation or non-affiliation—if Cablevision could prove that the affiliated and non-affiliated networks are not similarly situated.⁵¹⁴ However such discrimination is actionable only if, as occurred here, it unreasonably restrains the ability of the non-affiliated network to compete fairly. As is demonstrated throughout this Initial Decision, the unjustified loss of expanded basic tier distribution on Cablevision's systems rendered fair competition unattainable for GSN.

C. GSN Has Proven that Cablevision's Discriminatory Conduct Unreasonably Restrained Its Ability to Compete Fairly

115. The consequences of Cablevision's unilateral retiering of GSN were substantially harmful. As a direct result of Cablevision's discriminatory retiering conduct, GSN lost access to 96 percent fewer Cablevision subscribers, a significant portion of whom highly valued GSN's programming.⁵¹⁵ As a direct result of Cablevision's discriminatory retiering conduct, GSN lost access to 4 percent of its total subscribers.⁵¹⁶ As a direct result of Cablevision's discriminatory retiering conduct, GSN was deprived of approximately {{[REDACTED]}} in annual licensing revenue.⁵¹⁷ As a direct result of Cablevision's discriminatory conduct, GSN lost approximately {{[REDACTED]}} in annual advertising revenue, which represents an annual loss of 3 percent of GSN's total advertising revenue.⁵¹⁸ In addition,

⁵¹⁰ See *supra* para. 107 (Cablevision's own expert confirmed that Cablevision would have saved significantly more in programming costs by retiering WE tv than it achieved from retiering GSN).

⁵¹¹ See *supra* para. 67 (both GSN and Cablevision expert analyses showed that WE tv's viewership increased as a direct result of GSN's retiering).

⁵¹² Tr. at 112:23-25.

⁵¹³ See 47 U.S.C. § 536(a)(3); 47 CFR § 76.1301(c). On its face, neither section 616 of the Act nor section 76.1301(c) of the Commission's rules permits Cablevision to discriminate against a non-affiliated network, or in favor of an affiliated network, in the selection, terms, or conditions of carriage, so long as its affiliated network(s) is not similarly situated to the complaining non-affiliated network.

⁵¹⁴ See *Tennis Channel*, 717 F.3d at 985.

⁵¹⁵ See *supra* paras. 37, 88.

⁵¹⁶ See *supra* para. 89.

⁵¹⁷ *Supra* para. 88.

⁵¹⁸ See *supra* para. 90.

Cablevision's discriminatory retiering conduct unfairly and unreasonably restrained GSN's ability to compete for viewers in the highly reputed New York DMA, which in turn, unreasonably impaired GSN's ability to compete for advertisers.⁵¹⁹ Based on the preponderance of substantial and undisputed evidence, the Presiding Judge concludes that Cablevision's discriminatory retiering conduct unreasonably and wrongfully restrained GSN's ability to compete fairly.

116. Cablevision argues however that because it "has less than 3% of subscribers in the national video programming market in which GSN competes," it is "incapable" of restraining GSN's ability to compete fairly.⁵²⁰ Cablevision's argument is unsupported, erroneous and rejected. As discussed in paragraph 78 above, Cablevision attempted to justify its discriminatory retiering conduct by pointing out that its retiering of GSN allowed it to save one-quarter of 1 percent of its {{ [REDACTED] }} programming budget, or more significantly, approximately 3 percent of the {{ [REDACTED] }} increase in programming costs it was facing.⁵²¹ Yet Cablevision disingenuously argues that GSN was not sufficiently harmed by its discriminatory retiering conduct even though GSN lost: (1) 4 percent of its total subscribers; (2) 3 percent of its total annual advertising revenue; and, (3) nearly all of its annual license fee revenue from Cablevision. Each of these quantifiable losses alone unreasonably restrains GSN's ability to compete fairly. Moreover, the unlawful retiering of GSN to an ill-fitting, inappropriate and costlier tier equally unreasonably restrained GSN's ability to compete fairly.⁵²² So not only is Cablevision in a more powerful position to discriminate, the preponderance of record evidence proves that Cablevision's discriminatory retiering conduct unreasonably restrained GSN's ability to compete fairly.

D. Remedy

117. In light of the evidence received at hearing, the *HDO* instructs the Presiding Judge "to determine whether Cablevision should be required to carry GSN on its cable systems on a specific tier or to a specific number or percentage of Cablevision subscribers and, if so, the price, terms, and conditions thereof."⁵²³ The *HDO* further instructs the Presiding Judge to determine whether Cablevision should be required to implement such other carriage-related remedial measures as are deemed appropriate.⁵²⁴

118. On two occasions, Cablevision considered but rejected a legitimate business option to unilaterally drop its carriage of GSN.⁵²⁵ As the conclusions of law determined that Cablevision discriminated against GSN as a non-affiliated network with the effect of unreasonably restraining GSN's ability to compete fairly, the related issues presented are on which tier and under what terms Cablevision must carry GSN; not whether Cablevision must carry GSN at all.⁵²⁶ Because Cablevision has decided to

⁵¹⁹ See *supra* paras. 91-93.

⁵²⁰ Cablevision Br. at 23.

⁵²¹ *Supra* paras. 31-32. See also Bickham Testimony at 94 (Bickham testified that in Cablevision's 2011 programming budget continued distribution of GSN on the expanded basic tier represented "three percent . . . [of the] increase budgeted year over year" and thus was significant "as opposed to [GSN] as a percentage of the [total] cost of programming."); Dolan Testimony at 217 (Dolan testified that trimming {{ [REDACTED] }} from Cablevision's {{ [REDACTED] }} 2011 programming budget was "certainly a material amount of money").

⁵²² See *supra* paras. 91-93.

⁵²³ 27 FCC Rcd at 5136-37, para. 39.

⁵²⁴ *Ibid.*

⁵²⁵ See *supra* paras. 30, 34.

⁵²⁶ Cablevision argues that "GSN's complaint should also be dismissed for the independent reason that the remedy it seeks is barred by the First Amendment." Cablevision Br. at 24 n.82. The Presiding Judge is without authority to rule on Cablevision's constitutional argument. See *Califano v. Sanders*, 430 U.S. 99, 109 (1977) ("Constitutional questions obviously are unsuited to resolution in administrative hearing procedures . . ."). See also *Petruska v. Gannon Univ.*, 462 F.3d 294, 308 (3d Cir. 2006) ("[A]s a general rule, an administrative agency is not competent to (continued....)

continue to carry GSN, section 616 of the Act and section 73.1301(c) of the Commission's rules require Cablevision to carry GSN in a non-discriminatory manner which will allow GSN to compete fairly. Cablevision's act of retiering that moved GSN to a premium sports tier violates section 616 of the Act and section 73.1301(c) of the Commission's rules because (1) the retiering of GSN on the premium sports tier was based solely on GSN's non-affiliation, and (2) the retiering of GSN on the premium sports tier unreasonably restrains GSN's ability to compete fairly. Therefore, Cablevision is ordered to cease engaging in its unlawful discriminatory conduct and restore its carriage of GSN to the expanded basic tier. Cablevision also must continue paying GSN the existing license rate of {{[REDACTED]}}.

119. GSN also requests that Cablevision be required to enter into a new carriage agreement with GSN, and that such agreement provide that Cablevision (1) distribute GSN as broadly as it distributes WE tv, and (2) pay GSN the same license rate that it pays to WE tv.⁵²⁷ GSN's request is denied. Such remedy is not appropriate because it is Cablevision's carriage of GSN on the premium sports tier that has been adjudged unlawful, not its carriage of GSN on an at-will basis. In fact, Cablevision carried GSN at-will for {{[REDACTED]}} prior to the retiering conduct that is the subject of GSN's Complaint. This record as a whole does not support requiring Cablevision to enter into a new carriage agreement. In order to remedy its unlawful retiering, Cablevision must carry GSN on the expanded basic tier (or the current or future tier that has 90 percent or more penetration) and at the existing license rate of {{[REDACTED]}}, until such time as the parties enter into a new carriage agreement or for a period of five years, whichever occurs first.⁵²⁸

120. The *HDO* also calls on the Presiding Judge to determine "whether an Order for Forfeiture shall be issued against Cablevision."⁵²⁹ Cablevision is subject to a forfeiture penalty of \$37,000 for each day of a continuing violation like its discriminatory retiering conduct, but not to "exceed a total of \$400,000."⁵³⁰ Based on the "nature, circumstances, extent, and gravity of the violations and, with respect

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determine constitutional issues."); *Spiegel, Inc. v. FTC*, 540 F.2d 287, 294 (7th Cir. 1976) ("Generally, federal administrative agencies are without power or expertise to pass upon the constitutionality of administrative . . . action."). *But see Meredith Corp. v. FCC*, 809 F.2d 863, 874 (D.C. Cir. 1987) (the court remanded a constitutional argument to the Commission to analyze and decide). In addition, under the *HDO*, this case is limited to whether Cablevision has engaged in discriminatory conduct with the effect of unreasonably restraining GSN's ability to compete fairly as proscribed by section 616 of the Act and section 76.1301(c) of the Commission's rules, and if so, the remedy that should be prescribed to address Cablevision's unlawful conduct. 27 FCC Rcd 5136-37, para. 39.

⁵²⁷ Complaint at 32, para. 65. At hearing, Montemagno testified that Cablevision currently pays WE tv a license fee of {{[REDACTED]}}, and will pay WE tv {{[REDACTED]}} per subscriber per month in 2017. Tr. at 1646:19-24.

⁵²⁸ Although the parties' previous negotiations for a new carriage agreement reached an impasse in 2009 due to Cablevision's insistence on the inclusion of {{[REDACTED]}} MFN clause (*see supra* para. 22-24), the Presiding Judge notes that in 2011, Cablevision entered into a new carriage agreement with WE tv that {{[REDACTED]}} but in which Cablevision agreed to pay license rates that were {{[REDACTED]}} to the license rates in its previous contracts with {{[REDACTED]}} which, at least between 2005 through 2010, had {{[REDACTED]}}. Tr. at 1649:15-1650:8 (Montemagno testified that around February 2011, Cablevision entered into a new carriage agreement with {{[REDACTED]}} at the "{{[REDACTED]}}" it had paid under the prior agreement which included an {{[REDACTED]}}). The Presiding Judge also notes that Cablevision's own witness testified that "{{[REDACTED]}}" and that the {{[REDACTED]}} was {{[REDACTED]}} carriage agreement even though Cablevision had never {{[REDACTED]}}. *See* Martin Testimony at 253, Tr. at 1649:15-1650:8; *see also supra* note 498.

⁵²⁹ 27 FCC Rcd at 5137-38, para. 44. Section 503(b)(1)(B) of the Act and section 1.80(a)(2) of the Commission's rules authorize the assessment of a forfeiture where, as has occurred in this case, a person is found to have "willfully or repeatedly failed to comply" with a provision of the Act or the Commission's rules. 47 U.S.C. § 503(b)(1)(B); 47 CFR § 1.80(a)(2).

⁵³⁰ 47 CFR § 1.80(b)(1). GSN recommends that the Presiding Judge order Cablevision to pay a forfeiture in the amount of \$400,000, the maximum penalty allowed. GSN Br. at 25; *see also Game Show Network, LLC v.*

(continued....)

to the violator, . . . , ability to pay, and such other matters as justice may require,”⁵³¹ the Presiding Judge concludes that imposition of the maximum forfeiture of \$400,000 is warranted in this case. By retiering GSN in 2011 to its premium sports tier, Cablevision “willfully or repeatedly failed to comply” with section 616 of the Act and section 76.1301(c) of the Commission’s rules because Cablevision retiered GSN on the basis of non-affiliation. Such discriminatory conduct continues to the present day and unreasonably restrains GSN’s ability to compete fairly. In fact, Cablevision has unreasonably restrained GSN’s ability to compete fairly since 2011, a period that is more than five years and still running. Cablevision has presented no argument or specific facts or circumstances to demonstrate that a lesser monetary forfeiture would be appropriate in this case.⁵³² Cablevision clearly is able to pay the maximum monetary forfeiture of \$400,000, a small portion of the approximately {{ [REDACTED] }} Cablevision has reaped thus far from its discriminatory conduct in violation of section 616 of the Act and section 76.1301(c) of the Commission’s rules.⁵³³ Under these circumstances, assessment of the maximum forfeiture against Cablevision manifestly is appropriate and is in the public interest.

IV. ULTIMATE CONCLUSIONS AND DECISION

121. Based on the foregoing findings of facts and conclusions of law, it is held that GSN has satisfied its burden of proving by a preponderance of evidence that Cablevision engaged in discrimination in the selection, terms, or conditions of carriage on the basis of GSN’s non-affiliation with Cablevision.

122. Based on the foregoing findings of fact and conclusions of law, it is further held that GSN has satisfied its burden of proving by a preponderance of evidence that Cablevision unreasonably restrained GSN’s ability to compete fairly.

123. Accordingly, in light of the ultimate conclusions and holdings reached above, IT IS DECIDED AND ADJUDICATED that Cablevision is continuously in violation of section 616(a) of the Act and section 76.1301(c) of the Commission’s rules.

V. ORDER

124. IT IS ORDERED that pursuant to section 503 of the Communications Act of 1934, as amended, Cablevision is ORDERED TO PAY TO THE UNITED STATES GOVERNMENT A

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Cablevision Systems Corp., Proposed Findings of Fact and Conclusions of Law of Game Show Network, LLC (filed Sept. 11, 2015) at 73.

⁵³¹ See 47 U.S.C. § 503(b)(2)(E); 47 CFR § 1.80(b)(8).

⁵³² The Presiding Judge notes that shortly after GSN’s unlawful retiering, Rutledge and Bickham left Cablevision. *Supra* notes 54 and 56. In relation to their departures, Dolan testified that Cablevision “{{ [REDACTED] }}

Testimony at 211-12. Montemagno replaced both Bickham and Rutledge, and he reported directly to Dolan. *Id.* at 212. Dolan further testified that with Montemagno in charge “{{ [REDACTED] }}

“{{ [REDACTED] }}.” *Ibid.* But after GSN was unlawfully retiered to the premium sports tier at behest of Bickham and Rutledge in 2011, as Montemagno testified, there was nothing that prevented Cablevision from returning GSN to the expanded basic tier in 2012, 2013, 2014, or 2015—Cablevision simply chose to continue to carry GSN in a discriminatory manner. See Tr. at 1580:8-1581:13. See also *id.* at 1584:13-1585:18 (Montemagno testified that at the time of retiering, Cablevision’s net income (or profit) was \$575 million and that Cablevision’s “current” profit was \$813 million).

⁵³³ See *supra* note 412 (by unlawfully retiering GSN, Cablevision reduced its annual cost to distribute GSN’s programming from {{ [REDACTED] }} to less than {{ [REDACTED] }}, or by {{ [REDACTED] }} over 5 years). Four hundred thousand dollars is the statutory maximum for such misconduct, as federal communications laws do not allow for punitive forfeitures.

MONETARY FORFEITURE in the amount of \$400,000.

125. IT IS FURTHER ORDERED that Cablevision is prohibited from discriminating against GSN in the terms and condition of its video programming distribution.

126. IT IS FINALLY ORDERED that Cablevision must proceed as soon as practicable with remediation as determined and forfeiture payment as required by paragraphs 118 through 120 above.⁵³⁴

FEDERAL COMMUNICATIONS COMMISSION

Richard L. Sippel*
Chief Administrative Law Judge

⁵³⁴ This Initial Decision shall become effective and this proceeding shall be terminated 50 days after its release if exceptions are not filed within 30 days thereafter, unless the Commission elects to review the case on its own motion. 47 CFR § 1.276.

*Pamela L. Smith, Esq., on loan from the Office of General Counsel, has provided advice, analysis, and multiple drafts in crafting this Initial Decision.

GAME SHOW NETWORK, LLC V. CABLEVISION SYSTEMS CORPORATION
MB DOCKET NO. 12-122. FILE NO. CSR-8529-P

JOINT GLOSSARY

Term	Definition
Ad Avails (or Advertising Availabilities)	Advertising units during the programming of a network (usually 2-3 minutes per hour) that are made available for an MVPD to sell pursuant to the affiliation agreement between the parties. The network reserves the remaining advertising time for itself to sell to advertisers.
ADU (or Audience Deficiency Unit)	Units of commercial advertising inventory made available to advertisers as fulfillment for the inventory the advertisers purchased that ran in programs that under-delivered on contracted audience demographic ratings.
Affiliated	A network is “affiliated” with an MVPD if either entity holds an interest in the other, or if a third party holds an interest in both entities, that is an “attributable interest” as defined by Section 616 of the Communications Act of 1934, as amended, and its implementing regulations.
Affiliation Agreement	A contract used to license a programming network to an MVPD for distribution to the MVPD’s retail subscribers.
AMC Networks, Inc.	A publicly-traded company that owns and operates several national programming networks, including AMC, WE tv, IFC, and Sundance Channel, as well as international programming networks. AMC Networks Inc. was incorporated on March 9, 2011 as an indirect, wholly-owned subsidiary of Cablevision. It subsequently acquired 100% of the limited liability company interests in Rainbow Media Holdings, LLC. AMC Networks, Inc. became a public company on June 30, 2011.
Bresnan Broadband Holdings, LLC	A cable distributor serving subscribers in Montana, Wyoming, Colorado, and Utah that was acquired by Cablevision in December 2010. Cablevision operated Bresnan Broadband Holdings using the “Optimum” brand name until July 1, 2013, when Cablevision sold its Bresnan Broadband Holdings operations to Charter Communications, another MVPD.
Broadcast Basic	<i>See Tier.</i>
C3 Data	A measure of the commercials watched both live and for three days of DVR and video-on-demand playback and the metric under which much of primetime advertising is bought and sold.
Cablevision	<i>See Cablevision Systems Corp.</i>

Cablevision Systems Corp.	The defendant in this proceeding. Through its subsidiary, CSC Holdings, LLC, Cablevision operates a number of cable systems in and around the New York metropolitan area. Cablevision had an ownership interest in national and international programming networks through its wholly-owned subsidiary Rainbow Media Holdings, LLC, until AMC Networks Inc. acquired those interests and became an independent public company on June 30, 2011. Cablevision is a “multichannel video programming distributor” as defined in Section 76.1300(d) of the Commission’s rules.
CAB	The Cable Advertising Bureau, a trade organization established to provide promotional, sales, and advisory services to the cable industry. In May 2015, the CAB changed its name to the Video Advertising Bureau.
Carriage Agreement	<i>See Affiliation Agreement.</i>
Consumer Price Index (“CPI”)	Some carriage agreements provide for license fees to increase by the CPI, which is typically less than 3% a year.
Coverage Area	When used in connection with a programming network, the number of homes that receive the programming network.
Coverage Area Rating	The estimate of the size of the audience relative to the total number of homes or people that can receive this programming network.
CPM	The cost of advertising per thousand potential customers reached by a given broadcast advertisement.
Demographics	The component parts of a network’s audience, based on various characteristics such as age, gender, income, or education level.
DBS	Direct Broadcast Satellite. Examples of DBS operators include DIRECTV and DISH Network (also known as EchoStar).
Direct Response Advertising	Advertising that is sold by a network but does not include guaranteed delivery of a certain demographic.
DMA	Designated Market Area; a geographical designation of a media market created by Nielsen Media Research.
Expanded Basic	<i>See Tier.</i>
Family Cable	<i>See Tier.</i>
Forced Tuning	Setting a “default” tune for digital cable set-top boxes, which will determine which programming network appears when a cable box is switched on.
Game Show Network (“GSN”)	A cable television network launched in 1994 and, since at least November 2009, jointly owned by DIRECTV and Sony Pictures Television. Game Show Network is the complainant in this case.
General Rate Advertising	Advertising that is sold by a network and includes guaranteed delivery of a certain demographic.
HH	Household.
iO Sports Pak	<i>See Tier.</i>

iO Sports & Entertainment Pak	<i>See Tier.</i>
L3 Data	Nielsen data measuring live viewing of a television program plus three days of DVR or video-on-demand playback viewing.
License Fee	The fee that an entity pays for the right to distribute programming. In the context of a relationship between a network and an MVPD, the license fee is typically expressed as an amount of money per subscriber per month. These are also sometimes referred to as “affiliate fees” or “carriage fees.”
MRI	Mediamark Research and Intelligence, a company that conducts an annual “Survey of the American Consumer” measuring media usage, demographics, and consumer behavior.
MFN	Abbreviation for “Most Favored Nations.” A provision in affiliation agreements granting a distributor the right to be offered any more favorable rates, terms, and/or conditions subsequently offered or granted by a programming network to another distributor.
MSO	Multiple System Operator; a cable operator that operates multiple cable systems.
MVPD	Multichannel Video Programming Distributor; a distributor that delivers more than one channel of video programming to subscribers, as defined in 47 C.F.R. 76.1300(d). There are various types of MVPDs, including MSOs and other cable operators; DBS operators; and telephone company (telco) video providers.
Nielsen Local Market Rating	Total market rating published by Nielsen for a specific local market, as defined by Nielsen. There are two separate Nielsen systems that produce this local market data: the Nielsen Television Index (“NTI”) and the Nielsen Station Index (“NSI”).
Nielsen National Rating	Total market rating or coverage area rating published by Nielsen for the Nielsen national market.
Nielsen Station Index (“NSI”)	Market data collected and published by Nielsen to provide local ratings. It is a component of the Nielsen Local Market Rating.
Nielsen Television Index (“NTI”)	Market data collected and published by Nielsen to provide local ratings in certain large markets. It is a component of the Nielsen Local Market Rating.
Penetration	A network’s “penetration” is a percentage reflecting the proportion of a particular MVPD’s video subscribers that receive a particular network.

People Meter	An electronic device used by Nielsen Media Research to measure nationwide audiences. The device is attached to a TV set to measure tuning status (set on/off, channel, time, and duration of tuning) as well as demographic data. Household members and their guests push buttons to identify themselves.
Programming Network	A type of “video programming vendor,” as defined in 47 C.F.R. 76.1300(e).
Rainbow Media Holdings, LLC	Formerly a wholly-owned subsidiary of Cablevision that, until it was acquired by AMC Networks, Inc., owned and operated several national programming networks, including AMC, WE tv, IFC, Sundance Channel, and Wedding Central, as well as international programming networks.
Rate Card	The set of license fee rates offered by a programmer to an MVPD.
Reach	The number of individuals or households that watch a network at least once during a given time period. Also referred to as “Cumulative Audience.”
Retransmission Consent Fee	A fee paid by an MVPD to a broadcast network for permission to retransmit the network’s signal to the MVPD’s customers.
Scatter Advertising	Advertising sold outside of the upfront period with a guaranteed specific demographic.
Set-Top Box Data	Data collected digitally by MVPDs from subscribers’ set-top cable boxes.
Service Description	A contractual term in an affiliation agreement defining the type of content the network will provide to the MVPD in return for payment of a license fee.
Subscriber (also known as a “Sub”)	A customer of an MVPD.
Telco	Telephone Company. Refers to telephone companies, such as Verizon and AT&T, that provide multichannel video service and that, therefore, are MVPDs.

Tier	<p>A package of programming networks on an MVPD's system that are sold as a unit.</p> <p>As of February 2011, Cablevision's tiers included, among others:</p> <ul style="list-style-type: none"> • Broadcast Basic: The most broadly penetrated tier of programming, available to all of Cablevision's customers, which consists generally of broadcast networks. • iO Family Cable a/k/a Expanded Basic: The second-most highly-penetrated level of service received by Cablevision's subscribers. • iO Sports & Entertainment Pak: A tier of additional programming networks available to Cablevision subscribers at an additional price. Prior to February 2011, the tier was named "iO Sports Pak."
Upfront Advertising	<p>The buying of national, demographic-guaranteed television advertising time for a full broadcast year (generally September through August) via one negotiation. Upfront buying usually requires representation throughout all four quarters; allows cancellation options in the last six months of a buy and generally allows audience guarantees to advertisers.</p>
Viewers Per Viewing Household ("VPVH")	<p>Estimated number of viewers, usually classified by age and sex, comprising the audience within those households viewing a given station or program or using television during a particular time period.</p>
WE tv	<p>A cable television network launched in 1997 as "Romance Classics" and later rebranded as "WE: Women's Entertainment" and then "WE tv." It is operated by AMC Networks, Inc. (formerly by Rainbow Media Holdings) and is an affiliate of Cablevision.</p>
Wedding Central	<p>A cable television network launched in August 2009 featuring wedding-related programming. It was operated by Rainbow Media Holdings and was an affiliate of Cablevision until it was shut down in June 2011.</p>